CIVIL APPEALS: THE YEAR IN REVIEW

RAPID FIRE

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RAPID FIRE TOPICS

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1. Mandatory CPD Requirement

Green v. Law Society of Manitoba, 2017 SCC 20, [2017] 1 S.C.R. 360, per Wagner J. for the majority, Abella and Côté JJ. dissenting), dismissing an appeal from the Manitoba Court of Appeal (Monnin, Cameron and Mainella JJ.A.), 2015 MBCA 67, 319 Man. R. (2d) 189, affirming a decision of Rempel J., 2014 MBQB 249, 313 Man. R. (2d) 19.

A 60-year member of the Manitoba Bar, Mr. Sydney Green, was suspended for failing to comply with the *Rules of the Law Society of Manitoba* ("Rules") that make its CPD program mandatory and that provide for the imposition of an automatic suspension for failing to meet the program's requirements. Mr. Green applied for judicial review challenging the validity of the Rules, but did not challenge his suspension. The application judge dismissed the application and the Manitoba Court of Appeal dismissed the appeal.

Held: Appeal dismissed.

In explaining why the Court would grant leave in this case, Wagner J. stated: "The Court has never addressed the appropriate standard of review to be applied when considering the validity of rules made by a law society" (at para. 19). The majority held that the reasonableness standard of review applies to the review of a law society rule. Reasonableness is the appropriate standard for several reasons:

1. In making rules of general application to the profession, the benchers of a law society act in a legislative capacity.
2. Many benchers of a law society are elected by and accountable to members of the legal profession. The reasonableness standard ensures that the courts will respect the benchers' responsibility to serve those members.
3. The law society acted pursuant to its home statute in making these rules, and as a result, there is a presumption that the appropriate standard is reasonableness. A law society must be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute.
4. A law society is a self-governing professional body with expertise in regulating the legal profession at an institutional level.

A rule requiring practicing lawyers to complete 12 hours of CPD a year or face suspension without a hearing is reasonable. The purpose, words and scheme of the *Legal Profession Act* support an expansive construction of the Law Society's rule-making authority. Mr. Green's view that the CPD activities offered by the law society is of no moment: "it is not up to Mr. Green to decide whether CPD activities are valuable or adequate." The right to practice law is not a common law right or a property right but a statutory right. The penalty of a suspension is subject to common law procedural fairness and the CEO of the Law Society has discretion to temper the automatic application of the suspension.

Dissenting Opinion (Abella and Côté JJ.):

Where a suspension from the practice of law is imposed automatically for the least serious disciplinary breach possible — failing to attend classes — the Law Society is in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers (at para. 74). In contrast with other competency breaches where procedural protections apply, not even the barest of procedural fairness is authorized in relation to the CPD requirements, such as the ability to explain. And everyone, regardless of circumstances, is subjected to an identical sanction (at paras. 86-87). Meanwhile, the failure to comply with CPD requirements is as close to a victimless breach as it is possible to imagine (at para. 90). Public confidence in a lawyer's professionalism is inevitably undermined when it learns that a lawyer has been suspended. The Rule is manifestly unjust and thus is unreasonable.

Practice Tips:

- Unlike Manitoba's CPD scheme, Ontario's scheme permits the Law Society to exempt a lawyer from mandatory CPD, or reduce the number of required hours. The penalty for failure to comply is a fee for late compliance. A licensee may be suspended under s. 46(1) of the *Law Society Act* for failure to pay the fee for late compliance.
- Be sure to sign into your LSO portal and register your substantive and professionalism hours for today's conference.
- Pay more attention to bencher elections.
- Stay tuned for *Groia v. Law Society of Upper Canada* (heard on November 6, 2017) and *Trinity Western v. Law Society of Upper Canada* (to be heard on November 30, 2017)

2. Stare Decisis and Mootness

Black v. Owen, 2017 ONCA 397, (Feldman, Cronk and Miller JJ.A.), allowing an appeal, with leave, from the order of Wilson J. of the Superior Court of Justice, sitting as a judge of the Divisional Court, dated February 4, 2016 and reported at 2016 ONSC 40, allowing an appeal from Deputy Judge Caplan, dated December 4, 2014.

This appeal concerned the obligation of the appellants, Gerald Owen and Katherine Anderson ("property owners"), to pay an annual levy related to maintenance costs for common property within a private Toronto enclave known as Wychwood Park. The payment obligation was said to arise under an 1891 trust deed between the original owners of the various parcels of land within Wychwood Park. The appellants resisted payment to the respondent Trustees on the basis that Ontario law does not recognize an exception to the rule that a positive covenant cannot run with the land: see *Amberwood*

Investments Ltd. v. Durham Condominium Corp. No. 123 (2002), 58 O.R. (3d) 481, leave to appeal to S.C.C. abandoned, [2002] S.C.C.A. No. 208. As the requirement to pay the annual levies is a positive covenant, the property owners contended that it was unenforceable against them.

A judge of the Small Claims Court accepted the property owner's argument and dismissed the Trustees' action to recover the unpaid levies. A judge of the Divisional Court ("appeal judge") allowed the Trustees' appeal on the basis that the property owners were bound by the trust deed and were obliged to pay the annual levies for the benefits received. The appeal judge held that the majority of the Court of Appeal's reasons in *Amberwood* no longer reflected the current status of the law in Ontario, as a result of a 2013 decision of the English Court of Appeal in *Wilkinson v. Kerdene Ltd.*, [2013] E.W.C.A. Civ. 44 and a decision of the Ontario Superior Court of Justice in *Wentworth Condominium Corp. No. 12 v. Wentworth Condominium Corp. No. 59*, [2007] O.J. No. 2741. She held that Ontario law recognizes two exceptions to the positive covenants rule: the benefit and burden exception and the conditional grant exception. She ruled that both exceptions applied to the facts of this case.

The property owners appealed to the Court of Appeal with leave.

Held: Appeal allowed.

The appeal judge erred by failing to follow binding appellate precedent, namely the majority decision in *Amberwood,* and by holding that the benefit and burden and conditional grant exceptions to the positive covenants rule apply in this case (at para. 36). The appeal judge was not entitled to adopt the minority opinion in *Amberwood* as reflecting current Ontario law, either because of an alleged evolution in the English jurisprudence concerning the positive covenants rule or in reliance on her interpretation of the decision of another Superior Court judge in another case. The respondents expressly declined to request reconsideration of the majority decision in *Amberwood* by a five-judge panel of this court. Having so elected, they quite properly accepted that the principles of law articulated by the *Amberwood* majority apply in this case. Absent reconsideration by this court of its decision in *Amberwood*, or an authoritative pronouncement by the Supreme Court of Canada displacing the majority's holdings in *Amberwood*, it was not open to the appeal judge to disregard this binding precedent (at para. 41).

Practice Tips:

- A lower court judge's authority to depart from binding precedent is limited: see *Black v. Owen*, at para. 43, citing *Canada (A.G.) v. Bedford*, 2013 SCC 72, and *Carter v. Canada (A.G.)*, 2012 SCC 43. In *Bedford*, at para. 42, the court identified the following conditions that would justify a trial judge in refusing to follow binding precedent:

- A trial judge can consider and decide arguments based on *Charter* provisions that were not raised in a prior case.
- A trial judge may revisit a prior ruling if new legal issues are raised due to significant developments in the law, or "if there is a change in circumstances or evidence that fundamentally shifts the parameters of the debate".

- A lower court judge in Ontario may not treat a decision of the English Court of Appeal, or of an appellate court from outside Ontario - other than the Supreme Court of Canada - as a change in the law that has the effect of overturning a majority decision of the Court of Appeal for Ontario. As the court put it in *Black v. Owen*, at para. 45: [T]he extent to which the decision of the English Court of Appeal in *Wilkinson* warrants importation of the benefit and burden exception into Ontario law, if at all, was a matter for determination by this court. Neither *Wilkinson* in England nor *Wentworth Condominium Corporation* in Ontario [a decision of the Superior Court of Justice] permits a lower court judge to prefer the minority, over the majority, opinion of this court in *Amberwood*."
- Where a party wishes to request the Court of Appeal to reconsider one of its prior precedential decisions, counsel should refer to s. 13 of the Court's Practice Direction Concerning Civil Appeals for details on making a request to convene a five-judge panel.
- The decision to convene a five-judge panel is made by the Chief Justice or Associate Chief Justice in the exercise of their supervisory powers over sittings of the Court of Appeal conferred by s. 5 of the *Courts of Justice Act*. The decision whether to convene a 5-judge panel is not reviewable.
- It is rare for a respondent to be in a position to request a five-judge panel, but this may be necessary where the decision under appeal rests on a holding that appears to be inconsistent with a binding decision of the Court of Appeal. The Practice Direction makes it clear that any party to a proceeding may request a five-judge panel.

Slate Management Corp. v. Canada (A.G.), 2017 ONCA 763 (Hoy A.C.J.O., van Rensburg, and Roberts JJ.A.), quashing an appeal from the order of Hainey J. of the Superior Court of Justice, dated June 27, 2016, with reasons reported at 2016 ONSC 4216.

Three corporate subsidiaries amalgamated under the *Business Corporations Act,* R.S.O. 1990, c. B.16. The parent later learned that it had not achieved its intended tax outcome on the amalgamation because it chose to amalgamate in a single step, rather than in two steps.

The parent company applied for and received a rectification order. The rectification order of June 27, 2016 deemed the single-step amalgamation not to have occurred; deemed in substitution the amalgamation to have occurred in two-steps on January 1, 2015;

approved a plan of arrangement under the *OBCA* deeming the initial amalgamation not to have occurred and the required two-step amalgamation to have occurred on January 1, 2015, *nunc pro tunc*; and directed the Director under the *OBCA* to cancel the certificate of amalgamation in respect of the initial amalgamation and endorse the Articles of Arrangement pursuant to s. 183 of the *OBCA* with a certificate dated January 1, 2015.

On July 26, 2016, Canada served a notice of appeal of the rectification order but did not seek a stay of the order pending appeal. On August 2, 2016, the plan of arrangement was implemented.

On December 9, 2016, the Supreme Court of Canada released its decision in *Fairmont Hotels Inc. v. Canada (Attorney General)*, 2016 SCC 56, [2016] 2 S.C.R. 720. The majority in *Fairmont Hotels* held that the Court of Appeal's decision on the test for rectification in a tax context in *Juliar v. Canada (Attorney General)* (2000), 50 O.R. (3d) 728, was irreconcilable with the Supreme Court's subsequent jurisprudence on the narrowly confined circumstances when the doctrine of rectification is available: see *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The Supreme Court overruled the test for rectification from *Juliar*, which the application judge had applied, and clarified the test for rectification in a tax context.

Slate Management brought a motion to quash the appeal, arguing that the AG's appeal was moot because the effect of the Supreme Court of Canada's decision in *Norcan Oils Ltd. v. Fogler*, [1965] S.C.R. 36, was that the Court of Appeal could not overturn the plan of arrangement approved as part of the rectification order.

Held: Appeal quashed.

The Court of Appeal has equitable authority to order the revocation of a certificate issued by the Director under corporate legislation, *nunc pro tunc*. However, the exercise of that authority is guided by principles laid out by the Supreme Court in *Norcan*.

Where, as in this case: 1) the Director under the *OBCA* issued a certificate pursuant to a rectification order; 2) the appellant could reasonably have sought a stay of the rectification order pending appeal, but did not do so; 3) the court is not satisfied that no third party acted, directly or indirectly in reliance on the certificate and would not be prejudiced by its revocation; and 4) there are no special circumstances justifying exercising the power to cancel the certificate, *Norcan* requires the court to decline to exercise its authority to order the revocation of that certificate (at para. 19).

Slate has provided evidence that third parties have relied on the financial consequences of the plan of arrangement implemented pursuant to the rectification order. At para. 27: "Because *Norcan,* properly interpreted, would not permit this court to give effect to a decision that Slate fails to meet the test for rectification in *Fairmont*, I find that this appeal is purely academic."

The court considered the following three factors from *Borowski v. Canada (Attorney General),* 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, at p. 358-363, for when a court will exercise its discretion to hear a moot appeal: (i) the presence of an adversarial context that will ensure that the issues are well and fully argued; (ii) concern for judicial economy; and (iii) awareness of the court's proper law-making function. The second factor weighs strongly against hearing the appeal. Resolving the appeal will not have a practical effect on the rights of the parties. The appeal concerns the application of the recently revised test for rectification to very particular facts. As a result, there is no social cost in leaving the matter undecided.

Practice Tips:

- The basis for the court's conclusion that the appeal was moot was that it could not give effect to the relief requested by the appellant because of the effect of a Supreme Court of Canada decision from 1965 combined with the appellant's failure to obtain a stay of the order under appeal. This is an interesting application of the mootness doctrine. A finding of mootness on the grounds that the resolution of the appeal will have no effect on the parties' legal rights is made where the factual foundation that gave rise to the legal dispute has disappeared. In this case, the factual foundation that gave rise to the legal dispute had not disappeared; however, it was altered as a result of a tactical error by appellant's counsel in failing to obtain a stay of the order under appeal.
- Rule 63.01 of the *Rules of Civil Procedure* prescribes what types of orders are automatically stayed pending appeal. To attract an automatic stay under r. 63.01(1), the order must be for the payment of money. A final or interlocutory order that is not stayed automatically under rule 63.01 may be stayed on such terms as are just by an order of the court whose decision is to be appealed: rule 63.02(1)(a). In addition, a party may bring a motion for a stay before a judge of the Court of Appeal if an appeal or a motion for leave to appeal has been taken to the Court of Appeal: rule 63.02(1)(b). The test for staying an order pending appeal under rule 63.02 is the same as the test for an interlocutory injunction established by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334.
- **Note re: *Stare Decisis***: When *Fairmont Hotels* was being litigated in the Court of Appeal, the Attorney General of Canada brought a request pursuant to s. 13 of the Court of Appeal's Civil Practice Direction asking the Chief Justice of Ontario to convene a five-judge panel in order to revisit its prior decision in *Juliar*. This request was refused. In the panel's brief endorsement dismissing the Attorney General's appeal, the panel stated (at paras. 10 and 13):

  > *Juliar* is a binding decision of this court. It does not require that the party seeking rectification must have determined the precise mechanics or means by which the party's settled intention to achieve a specific tax

> outcome would be realized. *Juliar* holds, in effect, that the critical requirement for rectification is proof of a continuing specific intention to undertake a transaction or transactions on a particular tax basis.
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> …
>
> At the end of the day, therefore, *Juliar* and the application judge's factual findings, described above, are dispositive of this appeal. It is not open to a single panel of this court to depart from a binding decision of this court.

Quaere the panel's view that *Juliar* was binding authority in light of the Supreme Court's subsequent decisions in *Shafron* and *Performance Industries*. The doctrine of *stare decisis* does not require the Court of Appeal to follow its previous authority when authoritative pronouncements of the Supreme Court of Canada have displaced that authority: see *Black v. Owen*, at para. 41.

3. Motor Vehicle Insurance

Cobb v. Long Estate, 2017 ONCA 717, (Doherty, MacFarland, Rouleau JJ.A.), dismissing the plaintiffs' appeal and allowing the defendant's appeal from the judgment of Belch J. of the Superior Court of Justice, sitting with a jury, dated November 25, 2015, with reasons reported at 2015 ONSC 6799 and at 2015 ONSC 7373, and allowing the defendant's appeal from the costs judgment by the same judge dated December 23, 2015, with reasons reported at 2015 ONSC 7373.

The plaintiff (Mr. Cobb) was seriously injured in a motor vehicle accident in 2009. The defendant (Mr. Long) pleaded guilty to impaired driving. The plaintiff brought an action in negligence. At trial, liability was not seriously disputed, however, the defendant refused to formally admit liability because the plaintiff refused to limit his monetary claim to the defendant's liability insurance policy limit.

The plaintiff sought $2.35 million in compensatory damages and $3 million in punitive damages. The jury awarded the plaintiff $220,000 in compensatory damages, including $50,000 for past loss of income and $100,000 for future loss.

The trial judge rejected the plaintiff's request to put the question of punitive damages to the jury notwithstanding the plaintiff's submission that the defendant's drinking and driving conviction arising from the accident, and his earlier conviction for a similar offence, provided grounds for such an award.

Until June 29, 2010, the plaintiff had received $29,300 in income replacement benefits from his SABs insurer. On that day, he entered into a final settlement agreement with his SABs insurer for a total of $152,000, including $130,000 for past and future income loss. The trial judge deducted $159,300 from the jury award for past and future income loss,

reducing the income loss head of damage to zero. After all SABs deductions were made, the final judgment was $34,000.

The trial judge awarded the plaintiffs $409,098 in partial indemnity costs.

Both the plaintiff and the defendant appealed from the judgment.

Held: Plaintiffs' appeal dismissed, defendant's appeal allowed.

The Plaintiffs' Appeal

The plaintiffs' appeal raised three issues:

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

Answer: No.

On appeal, the plaintiffs argued that the defendant had the onus of proving how much of the SABs settlement related to past lost income, how much to future loss of income, and whether any of the settlement monies may have related to a claim for punitive damages. The plaintiffs argued that the defendant had not met this onus, and thus the judge should not have deducted settlement monies recovered from the jury's award. The plaintiffs also argued that the trial judge had to separate payments received for *past* income losses and those received for *future* income losses for the purpose of deducting SABs from damages.

The *Insurance Act* does not differentiate between past and future losses – s. 267.8 requires that a tort award be reduced by "[a]ll payments…that the plaintiff has received…before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity". The purpose of this provision is to prevent double recovery. Thus, it makes no difference that the jury award delineated past and future benefits, and the SABs settlement did not.

2. Did the trial judge err by not instructing the jury on punitive damages?

No.

Punitive damages are available only if all other penalties would be inadequate to accomplish the objectives of retribution, deterrence and denunciation. Per *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (C.A.), at para. 79: "Where a wrongdoer has already been punished for an offence and the same conduct is in question at a civil trial, punitive damages generally will not serve a rational purpose as the sentence imposed in the

criminal or regulatory environment will have already met the necessary objectives of retribution, deterrence and denunciation."

The Court of Appeal concluded that in this case, "there was no evidence to suggest that the defendant's criminal sentence, consisting of a fine of $1,300 and a one-year driving prohibition, was insufficient to meet the objectives of retribution, deterrence and denunciation." In arriving at this conclusion, the court noted that Ontario's *Victims' Bill of Rights, 1995*, S.O. 1995, c. 6 requires, at s. 4(4) that a trial judge in a civil case consider any criminal sentence before ordering that punitive damages be paid to a victim.

3. The 2015 prejudgment interest rate from the *Insurance Act* was applicable to the plaintiffs' damages for non-pecuniary loss and applied retrospectively

The accident occurred in 2008. At that time s. 128(2) of the *Courts of Justice Act* (*CJA*) provided that the prejudgment interest rate was 5%. However, in 2015, s. 258.3(8.1) of the *Insurance Act* was enacted, which effectively provides that the rate of interest applicable to damages arising out of a motor vehicle accident is the default rate set out by s. 127 of the *CJA* (2.5%).

The presumption that legislation does not have retrospective application is subject to a contextual analysis of legislative intent. For the last 40 years, when making significant changes to the prejudgment interest regime that were not to apply retrospectively, the legislature has clearly indicated that the changes were to have only prospective effect. The absence of similar temporal language in s. 258.3(8.1) supports the view that the legislature intended for this change to have retrospective effect. This interpretation is consistent with the goal of the legislation – to bring down the cost of claims in order to reduce automobile insurance rates.

In this case, the trial judge used his discretion to award prejudgment interest at a rate of 3%. He did not err in doing so. In arriving at this conclusion, the Court of Appeal was adamant that the *CJA* does not create a 'vested right' in any litigant to a particular rate of prejudgment interest – interest rates fluctuate over time, and the interest rates set by the court should reflect these changes as well. While the plaintiffs' right to tort damages vest at the moment of the accident, the rate of prejudgment interest applicable to those damages is always subject to judicial discretion.

The Defendant's Appeal

1. Did the trial judge err in refusing to deduct housekeeping benefits received from the damages award?

Answer: Yes.

The defendant cross-appealed on the basis that the judge erred by not allowing the defendant to deduct benefits awarded for past housekeeping costs from future housekeeping costs awarded at trial. The court allowed this ground of appeal.

In keeping with its earlier conclusions about deductions from SABs settlements, the court held that the insurance legislation does not distinguish between past and future awards.

2. Did the trial judge err in refusing to apply the statutory deductible retrospectively?

Answer: Yes.

The defendant argued that the trial judge erred in applying the statutory deductible in force *prior* to August 1, 2015 rather than the statutory deductible in force at the time of judgment.

The 2015 amendment applies retrospectively. The amendment to the *Court Proceedings* Regulation, O.Reg. 461/96 does not include transitional provisions. The previous version explicitly provided that it applied to losses that occurred "on or after October 1, 2003." Section 59 of the *Legislation Act*, *2006* creates a presumption that the applicable version of the regulation is the version currently in force. In addition, the fact that the dates for calculating the prescribed damage quantum in s. 267.5(8.3) of the *Insurance Act* above which the deductible does not apply match the dates in the *Court Proceedings* Regulation (which prescribes the actual amount of the statutory deductible) proves that the legislature must have authorized the executive to amend s. 5.1(1) with retrospective application to pending and future proceedings. This ensures that the damage quantum above which the deductible does not apply keeps pace with economic realities.

Costs Appeal

The trial judge erred on costs as follows:

Firstly, he did not take s. 267.5(9) of the *Insurance Act* - effective August 1, 2015 - into account when determining costs. Unlike the previous version of s. 267.5(9), the 2015 version provided that the statutory deductible must be considered in determining a party's entitlement to costs. The amendment to the *Insurance Act* applied to fixing costs in this case because (1) there is no vested right to costs; and (2) costs legislation is "procedural", rendering the amendment applicable.

Secondly, prior to trial, the defendant made a valid Rule 49 offer that exceeded the judgment. The fact that the offer left open the precise amount of costs did not invalidate it for the purposes of rule 49.

Thirdly, the trial judge's assessment of costs at $409,000 on a judgment that was essentially $22,136 (initially found to be $34,000 by the trial judge) was out of proportion. Although the case took 19 days to try, the costs award must reflect the reality that the final judgment – after appellate intervention – was for only $22,136. A trial judge should assess costs based on the amount remaining from the verdict after making all deductions. In the circumstances, it is reasonable that each party should bear its own costs of the trial.

Practice Tips:

- Remember that the *Insurance Act* requires *all* payments received before a trial in respect of income loss/loss of earning capacity to be deducted – there is no distinction between past and future losses.

- If you want to characterize portions of a SABs settlement as being unrelated to income loss, ensure that the settlement documents do so clearly.

- The January 2015 amendments to the *Insurance Act* in respect of interest will apply retrospectively. Litigants do not have a vested interest in previous interest rates from the *Courts of Justice Act*.

- Unsuccessful defendants may argue that the costs sought by the plaintiff are disproportionate to the judgment they obtained.

***El-Khodr v. Lackie*,** 2017 ONCA 716 (Doherty, MacFarland, Rouleau JJ.A.), allowing the appeal from the judgment of Roccamo J. of the Superior Court of Justice, dated August 26, 2015, sitting with a jury, with reasons reported at 2015 ONSC 2824, 2015 ONSC 4766 and 2015 ONSC 5244.

The defendants appealed from an award of damages arising from a motor vehicle accident.

The respondent suffered catastrophic injuries in a motor vehicle accident. Liability was admitted at trial. The jury awarded the respondent $2,931,006 in damages. The jury awarded $424,550 for "Professional Services (Physiotherapy, Psychology etc)" and $82,429 for "Medication and Assistive Devices".

In a series of rulings, the trial judge held that:

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

ii. The respondent was required to assign his future income replacement benefit from his Statutory Accident Benefits (SABs) insurer only to age 60 and not thereafter;

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

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

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

These five rulings were the subject matter of the defendants' appeal.

Held: Appeal allowed. Trial judge's order amended in several respects (see para. 87).

Prejudgment interest amendment

Pursuant to its ruling in *Cobb*, discussed above, the court reiterated that the January 1, 2015 amendment to Section 258.3(8.1) of the *Insurance Act* effectively provides that the rate of interest is the default rate set out by s. 127 of the *Courts of Justice Act* (2.5%) not the exceptional rate applicable to non-pecuniary loss set out in s. 128 (5%). The accident occurred in 2007. Section 258.3(8.1) applies retrospectively to all cases currently in the system. The *Courts of Justice Act* does not create a vested right to any particular rate of prejudgment interest by a litigant.

As a result, the applicable rate of interest is 2.5% not the 5% awarded by the trial judge. This reduced the amount of the plaintiff's judgment by $44,583.90.

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

It is clear from the verdict that the jury concluded the plaintiff would have retired at age 64 had the accident not occurred. Consequently, the obligation to assign should continue to his 64th birthday.

Whether the existence of the ODBP should have been treated as a "contingency" only rather than as a certainty

The trial judge should have instructed the jury to award damages based on the law as it currently exists. Since the respondent was presently entitled to the ODBP, that entitlement was a certainty.

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

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

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

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

Justice MacFarland made the following observation (at para. 72):

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

Here, unlike in *Gilbert*, the respondent was catastrophically impaired and he claimed damages from the time of trial to the end of his life. Also unlike the lump sum award in *Gilbert*, the jury's award itemized the heads of recovery. The trial judge erred in not ordering an assignment in relation to the awards for the cost of future medication and assistive devices and future professional services.

Practice Tips:

- 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.
- Defence counsel should be careful not to allow plaintiffs to avoid having SABs deducted from a tort award, thereby defeating the purpose of the legislation by lumping together claims covered by SABs with those which are not.
- In the wake of this decision, do not be surprised if the Court of Appeal strikes a five-judge panel to reconsider *Bannon* and *Gilbert*.

4. Homeowners' Insurance – Conflict of Interest

Reeb v. The Guarantee Company of North America, 2017 ONCA 771 (Sharpe, Lauwers and Roberts JJ.A.), allowing an appeal from the judgment of Justice C.M. Bondy of the Superior Court of Justice, dated December 6, 2016.

While playing with pellet guns at James Riley's house, Ryan Reeb shot Riley, who lost an eye. Both boys were 14 years old. Riley commenced an action against Ryan Reeb, and his parents Laura and Tim Reeb, for $1.5 million. The Reebs were separated at the time of the incident.

Laura Reeb had homeowner's insurance policy with Royal & Sun Alliance, which had third party liability of $1 million. Royal appointed counsel to defend Ryan Reeb under a non-waiver and reservation of rights agreement. In respect of coverage, Royal is represented by another law firm.

Ryan Reeb's counsel brought an application on his behalf for a declaration that he was insured under two additional insurance policies issued by the respondent insurers: his father's policy issued by the respondent The Guarantee Company of North America and his step-mother's policy issued by the respondent Co-operators General Insurance Company. Guarantee and Co-operators conceded that Ryan Reeb is insured under both policies but asserted that the intentional act exclusion in both policies applies to exclude the injuries suffered by James Riley.

The application judge dismissed the application to provide coverage under the respondents' policies on the basis that the intentional act exclusion clauses in the policies excluded coverage. Ryan Reeb appealed.

Held: Appeal allowed.

The Court of Appeal panel raised with counsel the issue whether Mr. Reeb's counsel was in a conflict of interest since he was being instructed and paid by the mother's insurer to defend Mr. Reeb, but if Mr. Reeb's appeal failed, then the Court of Appeal's decision would likely also eliminate coverage for Ryan Reeb under the Royal policy.

When a lawyer is retained by an insurance company to represent its insured, a conflict of interest may arise where the interests of the insurance company and the insured are not in alignment. In this case, there is a reasonable apprehension of a conflict between the interests of Mr. Reeb and Royal. The apprehension of conflict precludes the court from ruling on the merits of the appeal. Mr. Reeb ought to have had independent counsel who did not report to or take instructions from Royal to advise him on the advisability of bringing the underlying application in the face of a settlement offer by the plaintiffs that was under Royal's policy limits. Mr. Reeb ought to have had independent counsel to represent him on this appeal. There is no way of knowing how things would have unfolded had Mr. Reeb been represented by independent counsel throughout, which impugns both the application and this appeal.

Accordingly, the appeal was allowed and the application judge's decision set aside.

To determine what should happen next, the Court of Appeal panel invited written submissions from the parties and Royal. Independent counsel or *amicus curiae* should be appointed for Mr. Reeb and remunerated for the purpose of assisting the court in assessing what future steps should be taken in these proceedings.

Practice Tips:

- Insurance companies and their counsel need to be alert to possible conflict issues where coverage issues intersect with defence issues.
- Counsel appointed to represent an insured under a non-waiver and reservation of rights agreements need to consider whether they have a possible conflict of interest with the insured in considering settlement offers and pursuing litigation against other possible insurers.

5. Expert Witnesses

Saadati v. Moorhead**,** 2017 SCC 28, [2017] 1 S.C.R. 543 (per Brown J. for the Court), allowing an appeal from the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJ.A.), 2015 BCCA 393, 81 B.C.L.R. (5th) 1, and restoring the award of the trial judge (Funt J.), 2014 BCSC 1365.

The appellant, Mohsen Saadati, was involved in five motor vehicle collisions between 2003 and 2009. In 2007, he commenced an action against Moorhead, whose vehicle had struck Saadati's in the second collision. Saadati alleged that he had suffered both physical and mental injuries because of the accident.

The trial judge found that Saadati had not proven physical injuries, but that the accident had caused "psychological injuries, including personality change and cognitive difficulties." He awarded Saadati $100,000 in non-pecuniary damages. This finding was based not on expert evidence, but on the testimony of Saadati's family and friends, who testified that he had changed from a funny, energetic, and charming individual to a sullen person who was prone to mood swings.

The British Columbia Court of Appeal overturned the trial judge's decision on the ground that Saadati had failed to prove through expert evidence a medically recognized psychiatric or psychological illness.

Saadati appealed the Court of Appeal's decision to the Supreme Court of Canada.

Held: Appeal allowed. Trial judge's award restored.

The B.C. Court of Appeal erred in holding that in order to recover for mental injury a plaintiff must prove the existence of a recognized psychiatric illness. Canadian negligence law recognizes that a duty exists to take reasonable care to avoid causing foreseeable mental injury. The right to be free from negligent interference with one's mental health is grounded in the fact that a person's mental health – like physical integrity or property - is an essential means by which that person chooses to live life and pursue goals. Thus, the law of negligence in Canada accords equal treatment to mental and physical injury and there is no need for a plaintiff alleging mental injury to prove that their condition meets the threshold of "recognizable psychiatric illness". Requiring this of claimants alleging mental injury, while not imposing a corresponding requirement on claimants alleging physical injury, would be to treat victims of mental injury unequally.

As Brown J. explained, "This Court has […] never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it do so now. Just as recovery for *physical* injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for *mental* injury does not require proof of a recognizable psychiatric illness."

In Brown J.'s view, the common law's traditional reluctance towards allowing compensation for mental injury is premised upon dubious perceptions of psychiatry and mental illness in general which Canadian tort law should repudiate.

The elements of the cause of action of negligence (duty of care, breach, damage, factual causation, legal causation) are sufficient barriers to unmeritorious or trivial claims for mental injury. Brown J. noted that the claim in *Mustapha v. Culligan*, 2008 SCC 27 (the 'fly in a bottle' case) ultimately failed on *legal* causation: the claimant's damage was too remote from the claimant's breach. Thus, even when all other elements of the cause of action are established, legal causation – whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct – remains a pertinent question and a hurdle for claimants to overcome.

Brown J. also remarked that requiring claimants to prove, through expert evidence, a "clinically diagnosed, recognizable psychiatric illness" is inherently suspect as a matter of legal methodology. Diagnostic tools such as the Diagnostic and Statistical Manual of Mental Disorders, or "DSM", are constantly changing and evolving. Moreover, while an accurate diagnosis is obviously important for treatment purposes, the trier of fact adjudicating a claim for mental injury is not concerned with diagnosis but with symptoms and their effects.

The trial judge rightly decided that the evidence of Saadati's friends and family as to his symptoms was sufficient to establish compensable mental injury.

Practice Tips:

- Expert evidence is NOT necessary to prove compensable mental injury. Attempts to have a plaintiff's case dismissed on summary judgment for failure to adduce expert evidence are likely to fail.
- When acting for a plaintiff who alleges mental injury, consider whether expert evidence is truly required (and cost-effective) in the case at hand. *Saadati* stands for the proposition that testimony from fact witnesses may be sufficient to prove mental injuries.

Bruff-Murphy v. Gunawardena, 2017 ONCA 502, (Lauwers, Hourigan and Benotto JJ.A.) C61576, allowing an appeal from the judgment of Kane J. of the Superior Court of Justice, sitting with a jury, dated August 22, 2016.

The plaintiff/appellant was hit from behind by the defendant/respondent in a motor vehicle collision. The defendant admitted liability, but there was a jury trial on damages. The appellant alleged that she suffered multiple soft tissue damages in her neck, lower back, and right shoulder, as well as anxiety and depression, which prevented her from working.

The defence called Dr. Monte Bail, a psychiatrist, as an expert witness. Dr. Bail testified that the appellant was not credible and that the accident did not cause or exacerbate any psychiatric disorder of which she complained.

Dr. Bail's report revealed that he did not read the appellant's medical history until after he had examined her. When he did review the appellant's records, he detailed discrepancies between the records and the appellant's description of her damages, but did not provide her with an opportunity to explain these discrepancies. Dr. Bail purported to draw conclusions about the appellant's credibility and reliability as a witness.

At trial, appellant's counsel argued that Dr. Bail should not be permitted to testify because (i) his report was an attack on the Appellant's credibility; and (ii) he was biased. The trial judge allowed Dr. Bail to testify, notwithstanding his serious reservations about Dr. Bail's methodology and independence.

The trial judge also prohibited appellant's counsel from cross-examining Dr. Bail on prior court and arbitral findings to the effect that he was not an independent expert.

The trial judge did not charge the jury on the problems with Dr. Bail's evidence. The appellant's counsel did not object to the trial judge's charge.

After the jury retired, defence counsel brought a threshold motion under s. 267.4(12) of the *Insurance Act*, arguing that the appellant did not meet the threshold of suffering a permanent serious impairment of an important physical, mental or psychological function.

The jury returned its verdict a month before the threshold motion was decided. The jury assessed general damages at $23,500 and rejected all other heads of damage.

The trial judge then released reasons on the threshold motion holding that the appellant did indeed meet the threshold, and criticizing Dr. Bail's evidence. The trial judge noted that he only permitted Dr. Bail to testify because of the "very high threshold before a court may exclude testimony for bias established by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23.

Held: Appeal allowed. New trial ordered.

The appeal addressed two key issues:

1. Whether the trial judge erred in not permitting appellant's counsel to cross-examine Dr. Bail on prior court and arbitral findings made against him?

2. Whether the trial judge erred in qualifying Dr. Bail as an expert and for not intervening or taking steps to exclude his testimony thereafter?

Issue 1: Dr. Bail's Cross-Examination

The trial judge was correct in ruling that Dr. Bail could not be cross-examined on prior adverse judicial and arbitral findings about his independence as an expert.

The court relied on a line of cases including *R. v. Boyne*, 2012 SKCA 124, leave to appeal refused, [20013] S.C.C.A. No. 54 and *R. v. Ghorvei*, (1999) 46 O.R. (3d) 63 (C.A.) for the principle that a witness should not be cross-examined on the fact that his or her testimony has been rejected or disbelieved in a prior case. While cross-examination of a witness on relevant discreditable conduct may be permissible, rejection of a witness's testimony does not amount to a finding of discreditable conduct.

The court noted that it would be unfair to cross-examine a witness on unrelated testimony from a case not before the court. Comments from other cases about Dr. Bail's testimony in those cases "would have been of no assistance to the jury without an understanding of their factual foundation. That necessary context would only have served to divert the jury form the task at hand and convert the trial into an inquiry regarding the reliability of Dr. Bail's testimony in the three other proceedings."

Issue 2: Qualifying Dr. Bail as an expert and not taking steps to exclude his testimony

In permitting Dr. Bail to testify, the trial judge erred in principle by failing to conduct the cost-benefit analysis mandated by the second component of the *White Burgess* test for admissibility of expert evidence.

The first component of the *White Burgess* test requires the court to consider the four traditional "threshold" requirements for the admissibility of expert evidence established in *R v Mohan*: (i) relevance; (ii) necessity in assisting the trier of fact; (iii) absence of an exclusionary rule; (iv) need for the expert to be properly qualified.

The second component is a discretionary gatekeeping step where the court must balance the potential risks and benefits of admitting the evidence. The Court of Appeal noted that this is best thought of as "a specific application of the court's general residual discretion to exclude evidence whose prejudicial effect exceeds its probative value."

Here, the trial judge's reasons on the threshold motion revealed the serious problems with Dr. Bail's report. The Court of Appeal held that it was "evident from a review of Dr. Bail's report that there was a high probability that he would prove to be a troublesome

expert witness, one who was intent on advocating for the defence and unwilling to properly fulfill his duties to the court." These concerns ought to have led the trial judge to exercise his 'gatekeeper' function and exclude Dr. Bail's evidence.

Importantly, the court noted that the trial judge's gatekeeping functions does not end after the initial decision to permit the expert to testify. The gatekeeping function continues throughout the trial and the court must remain vigilant in balancing the probative value of opinion evidence against its prejudicial effects.

Here, there were serious concerns with Dr. Bail's testimony, including: (i) his attempt to usurp the role of the trier of fact and determine the issue of the appellant's credibility, (ii) his testimony on scientific testing in which "he torqued the results so that they produced results that supported his conclusion"; and (iii) testimony he provided which "suggests that [Dr. Bail] understands his primary role to be to expose inconsistencies and not to provide a truly independent assessment of [the appellant's] psychiatric condition."

In light of these concerns, the trial judge ought to have taken steps to address the problems with Dr. Bail's testimony. One option would have been to advise counsel that he intended to give either a mid-trial or final instruction that Dr. Bail's testimony would be excluded from the evidence in whole or in part. A second option would have been to ask for submissions from counsel on a mistrial.

Finally, the court noted that although generally the failure to object to a civil jury charge is fatal to a request for a re-trial on appeal, there is an exception where the misdirection/non-direction of the jury resulted in a substantial wrong or miscarriage of justice. The admission of Dr. Bail's evidence resulted in a substantial miscarriage of justice.

Practice Tips:

- Work closely with your expert witnesses to ensure they understand their obligations to be impartial and to assist the court. Expert witnesses (and counsel) must understand that the expert's role is *not* to advocate for a client's position.

- Do not attempt to cross-examine experts on the fact that their testimony has been rejected, disbelieved, or found to be partisan in prior cases. While this practice was not uncommon in trials in Ontario, the Court of Appeal has now clarified that it is improper.

- At trial, if the opposing side's expert is permitted to testify but appears to be an advocate, remember that the court's gatekeeper function is not at an end. Cross-examine the expert to expose issues such as bias and problematic methodology. After the expert's testimony, consider whether you should seek relief to have the expert's evidence struck in whole or in part. In a jury trial, object to the expert's

testimony on the record and ask that the problems with it be addressed in the jury charge.

6. Medical Malpractice and the Test for Causation

Surujdeo v. Melady**,** 2017 ONCA 41, (Strathy C.J.O., Pardu and Brown JJ.A.), dismissing an appeal from the judgment of Gans J. of the Superior Court of Justice, dated April 15, 2015.

Rossana Surujedo died at age 36 as a result of myocarditis, a viral illness which causes inflammation of the heart muscle. Her family members brought an action alleging that an ER physician and a respirologist (the "physicians"/ "appellants") who treated Rossana were negligent in failing to follow up on test results and properly diagnose and treat Rossana in time.

At trial, the jury found that the physicians breached the standard of care in their treatment of Ms. Surujdeo, resulting in her death. The trial judge awarded damages of $600,000 in accordance with the verdict, plus $450,000 in costs.

On appeal, the physicians raised five grounds of appeal:

1. **Test Results Issue:** The trial judge erred by: (i) allowing the plaintiffs to conduct written discovery of the physicians at the start of the trial; (ii) limiting the physicians' ability to adduce evidence on the Test Results Issue; and (iii) not fairly charging the jury on the Test Results Issue.
2. **Causation Charge:** The trial judge gave a flawed and unbalanced jury charge on causation.
3. **Jury Questions:** The trial judge's verdict questions to the jury on causation incorrectly stated the law on causation because they used the words "a cause" and did not use the words "but for";
4. **Number of Jurors:** The trial judge misdirected the jury about the number of jurors required to agree with each answer to the verdict sheet questions; and
5. **Polling:** The trial judge improperly refused to poll the jury at the physicians' request.

Held: Appeal dismissed.

Test Results Issue

One of the key issues in the trial below was whether the defendant physicians followed up on test results in a timely manner. The plaintiffs argued that if the defendants had followed up on test results in a timely manner, they would have appreciated the nature of Ms. Surujdeo's ailment and been able to treat her properly.

Some of the evidence regarding test results came from the hospital where Ms. Surujdeo was treated, which had originally been a defendant but was released from the action with the consent of all parties. The plaintiffs had not conducted discovery on the issue of when the test results became available or when they were communicated.

At trial, the physicians wanted to testify about what they knew or did not know about the test results. Plaintiffs' counsel objected on the grounds that the physicians were estopped from testifying about the test results in a way that would shift blame towards the hospital, having consenting to its release from the action. The trial judge ruled that the physicians could give evidence about the test results but that he would allow the plaintiffs to conduct some written discovery on the issue in the middle of the trial.

The Court of Appeal found that the trial judge possessed the power to permit further discovery mid-trial pursuant to his inherent powers to control the trial process. The order caused no prejudice to the physicians.

The defendants also argued that they were limited in adducing certain evidence on the Test Results issue. The Court of Appeal rejected this submission, holding that the trial judge's evidentiary rulings were fair and balanced.

Finally, the defendants submitted that the trial judge was unbalanced in his jury charge on the Test Results Issue, devoting a disproportionate amount of time to the plaintiffs' evidence and position. The Court of Appeal held that upon reviewing the charge, this submission was without merit. The trial judge put both sides' positions before the jury.

Causation Charge

The appellants submitted that the trial judge's charge on causation was too sparse given the importance of the issue, and that it was unbalanced and skewed in favour of the plaintiffs.

The Court of Appeal rejected this submission.

The court affirmed the principle that "brevity in a jury charge is desired" (*R. v. Daley*, 2007 SCC 53 at para. 56), and that a charge is adequate if it allows a jury to fully appreciate the issues in the case. This is a contextual inquiry, and the Court of Appeal noted that in this particular case, the appellants had had the opportunity to provide extensive submissions, which covered the standard of care and causation issues in the case, the day before the jury charge. "There was no need for the trial judge to repeat the exhaustive review of the evidence…appellants' counsel had given the day before in his closing."

Jury Questions

The trial judge framed the causation questions to the jury by asking whether each physician's breach of the standard of care was "a cause" of the patient's death. The appellants argued that the trial judge had erred by failing to ask whether the breach was a *but-for* cause of the death, as opposed to simply *a cause*. In making this submission,

the appellants relied on the Supreme Court's holding in *Clements v. Clements*, 2012 SCC 32, that the presumptive test for causation in any negligence case is whether the defendant's breach of the standard of care was a "but-for" cause of the injury complained of.

For the first time in Ontario's appellate jurisprudence, the Court of Appeal provided guidance on how the causation question for a jury should be worded, holding that the trial judge had erred "by approving jury questions that did not reflect the applicable "but for" causation test". The court cited with approval Wilson J.'s ruling in *Sacks v. Ross*, 2015 ONSC 7238 in which Her Honour held that there was "there is no compelling reason not to use the language of causation from *Clements* and other cases when drafting the questions for the jury on causation." However, Wilson J.'s decision was under appeal at the time, and a different panel of the Court of Appeal has since released reasons in *Sacks* (2017 ONCA 773) holding that Wilson J.'s ruling on the jury question issue was incorrect.

Although the Court of Appeal concluded that the trial judge had erred in his formulation of the question, it held that this was not a reversible error since he had taken great care to "thoroughly, accurately and repeatedly [instruct] the jury on the 'but for causation test' in his charge as well as a subsequent re-charge. When the questions were viewed in context of the charge, the jury was sufficiently instructed on the "but for" test for causation."

Number of Jurors

Under s. 108(5) of the *Courts of Justice Act*, in jury trials, the judge may ask the jury to answer specific questions, and enter judgment in accordance with the answers to those questions. Section 108(6) clarifies that it is sufficient if five of the six jurors in a civil trial agree on the answer to a question "and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer." The interpretation of this provision was raised on appeal.

In *Sacks*, for each physician, the jury was asked to (i) answer whether the physician breached the standard of care (yes/no); (ii) provide particulars of any breaches of care; (iii) answer whether the physician's breaches caused the patient's death; and (iv) provide particulars of the causal links.

The trial judge had instructed the jury that five out of six of them needed to agree on each question but that they could arrive at their conclusions in respect of each question for different reasons. The jury subsequently asked the judge whether, when providing particulars of the breaches of care and causation, (i) 5/6 needed to agree on each reason; (ii) 5/6 needed to agree on all reasons as a whole; or (iii) whether they could simply list out all the reasons provided by all jurors. The judge instructed the jury to proceed with option (iii).

On appeal, the physicians argued that as a result of the judge's ruling "the jury may have granted judgment based on answers to questions regarding breaches of the standard of

care and modes of causation to which fewer than five jurors agreed." In their view, the jury should have been instructed to list only particulars which five of six of them agreed on.

The Court of Appeal rejected this argument, holding that the correct way to interpret s. 108(6) is that 5/6 jurors must agree on the answer to "bottom line" questions – meaning the yes/no questions regarding whether (i) the physicians breached the standard of care and (ii) whether those breaches caused the patient's death. There is no requirement for five of six jurors to agree on every particular because jury members are entitled to rely on different parts of the evidentiary record to arrive at the same conclusion. Similarly, there is no requirement that the same five jurors agree on every question. In this case, there was nothing from the jury's answers to suggest that less than five jurors had agreed on the bottom line answers.

Polling

At trial, the appellants had asked the trial judge to poll the jury out of a concern that a proper verdict had not been reached based on the jurors' answers to questions. Specifically, they sought to poll the jury to ensure that five of the jurors had agreed on each of the particulars of the breach of the standard of care or causation. The trial judge declined to do so. The Court of Appeal, relying on Ontario cases in which civil juries were polled, held that "where concern exists in a civil trial as to whether five of the jurors have agreed on the answer to a "bottom line" question, it would be open to the trial judge to poll the jury to ensure the requirements of s. 108(6) of the *Courts of Justice Act* have been met." This power falls under the broad umbrella of a Superior Court judge's inherent jurisdiction. While the trial judge did have the power to poll the jury, his refusal to poll was correct because the appellants sought to poll for an impermissible purpose.

Practice Tips:

- Remember that superior courts have broad inherent jurisdiction to control their own process, and thus the judge can fashion creative remedies at a trial, such as ordering mid-trial discoveries, if necessary.
- In negligence cases, it's good practice to agree on causation questions that expressly incorporate the "but for" test (however, see *Sacks v. Ross*, *infra*).
- Bear in mind when appealing a civil jury case that the Court of Appeal is generally deferential towards the trial judge in respect of the jury charge. If the trial judge's charge is generally fair and addresses the key issues in a case such that a jury could perform its function, an appellate court is unlikely to sift through the charge on a granular level or order a new trial based on trivial omissions or errors.

Sacks v. Ross, 2017 ONCA 773, (Lauwers, Hourigan and Benotto JJ.A.), dismissing an appeal from the judgment of Wilson J. of the Superior Court of Justice, sitting with a jury, dated December 7, 2015.

This was an appeal by the plaintiffs from a jury verdict in a medical negligence action. The primary plaintiff, Jordan Sacks, experienced complications after a bowel surgery, leading to an anastomotic leak. By the time the leak was discovered and treated, Mr. Sacks was in septic shock. He went into kidney failure, required multiple surgeries, spent months in a medically induced coma, and some of his tissues became necrotic, eventually culminating in the amputation of his fingertips and his legs (below the knees).

At trial, the plaintiffs argued that Mr. Sacks' injuries were caused by cumulative errors made by the doctors and nurses who treated him after his bowel surgery, which resulted in delay in diagnosing and treating the anastomic leak. The defendants argued that any delay in diagnosis/treatment did not cause Mr. Sacks' injuries because unbeknownst to the health care team, he had contracted a rare, aggressive, undiagnosed necrotizing infection in his right lower back after the surgery, and this is what led to the amputations.

The jury found that four of the five medical defendants breached the respective standards of care in certain respects, but that none of these breaches caused Mr. Sacks' injuries.

At trial, Mr. Sacks' counsel argued that because this was a case in which there were multiple potential tortfeasors whose cumulative errors were alleged to have caused the injury, articulating the causation question using "but for" language for each defendant could confuse the jurors, leading them to think that *each* defendant's conduct had to be the *sole* cause of the plaintiff's injury. One defendant's conduct is rarely the sole cause of an injury in a delayed diagnosis/treatment case. Consequently, Mr. Sacks' counsel asked that the jury question be worded as: "Did the failure of [name] to meet the standard of care *cause or contribute* to Mr. Sacks' injury?"

Counsel for the defendants submitted that there was no reason to deviate from the "but for" language used in *Clements v. Clements*, 2012 SCC 32, which asks whether each defendant is a necessary, "but for" cause of the injury. Counsel argued that using the terminology of "caused or contributed to" might mislead the jury into finding that a defendant contributed to the injuries in a way that was *de minimis* or not material.

The trial judge chose to use the "but for" language, agreeing with the defendants that using the phrase "caused or contributed to" could confuse the jury. This was the reasoning cited with approval by a different panel of the Court of Appeal in *Surujdeo v. Melady*, 2017 ONCA 41, discussed above.

The questions put to the jury in this case were as follows:

Standard of Care

> 1.(a) Have the Plaintiffs satisfied you on a balance of probabilities that there was a breach of the standard of care on the part of [*]?
>
> Answer: [ ]
>
> (b) If yes, please state the particulars of the breach and provide clear and specific answers:
>
> Answer: [ ]

Causation

> 2.(a) If your answer to question 1(a) is yes, have the Plaintiffs proven, on a balance of probabilities, that but for the breach of the standard of care, the injuries of Jordan Sacks would not have occurred?
>
> Answer: [ ]
>
> (b) If your answer to question 2(b) is yes, how did the breach of the standard of care cause Jordan Sacks' injuries? Please provide clear and specific answers:
>
> Answer: [ ]

On appeal, Mr. Sacks' counsel argued that the trial judge erred in her wording of the jury questions and in her charge to the jury on causation, given that this case involved multiple tortfeasors.

Held: Appeal dismissed. Although the jury charge and questions were incorrect and ought to have used the language "caused or contributed to", this would not have changed the verdict.

Basic factual question was never asked

On appeal, counsel for Mr. Sacks argued that the trial judge's use of the wording in *Clements*, with its focus on a "but for" cause being a "necessary" cause of the injury, "introduced a fatal ambiguity into the questions that rendered the jury's answers unreliable."

Mr. Sacks argued that the jury was never asked to determine the basic factual question of whether there was a delay in his diagnosis and treatment that caused his injuries, regardless of whether this delay was negligent.

In the Court of Appeal's view, this concern was addressed in the trial judge's charge to the jury, which instructed them to assess whether the plaintiff established, on a balance

of probabilities, that the failure to diagnose Mr. Sack's anastomic leak in a timely fashion was a necessary cause of his unfavorable outcome.

Collective negligence and circular causation

Mr. Sacks argued that asking the jury to determine whether the conduct of each defendant *on his or her own* was necessary to bring about Jordan's injuries was inappropriate in this case because "no *individual* defendant's conduct could be said to have been necessary to cause the harm". This issue, sometimes referred to as "circular causation", arises in cases where "multiple defendants' collective negligence may create more delay than was actually necessary to cause the injury".

The court held: "with respect to delayed diagnosis medical negligence cases involving multiple tortfeasors, it ought not to be possible for any one of the negligent tortfeasors to sidestep liability on the basis that there was sufficient cumulative delay resulting from the negligent acts or omissions of other defendants so that it could not be proven under *Clements* that the defendant's particular contribution was 'necessary'…"

Lauwers J.A. reasoned that asking whether the delay "caused or contributed to the unfavorable outcome" would avoid the problem. This language is consistent with the language in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 26, as well as the Ontario *Negligence Act*. In Lauwers J.A.'s view, it is possible to set out the causation test without using the word "necessary" at all.

The Court of Appeal therefore held that Wilson J. should not have rejected the use of the phrase "caused or contributed to" in the formulation of the jury questions and instructions.

This conclusion is seemingly in conflict with a different panel of the Court of Appeal's approval of Wilson J.'s reasoning in *Surujdeo v. Melady*, discussed above.

Global "But for" test

The appellants proposed that the court introduce a "global but for" test which asks whether, but for the defendants' *collective* negligence, the plaintiff would have suffered his or her injuries. In the court's view, such a test is unnecessary. Instead, Lauwers J.A. endorsed framing jury questions in delayed diagnosis and treatment cases involving multiple potential tortfeasors as follows:

(i) Has the plaintiff proven on a balance of probabilities that a delay in treatment caused the plaintiff's injuries?

If the answer to that question is "yes", in respect of each individual defendant:

(ii) Has the plaintiff proven on a balance of probabilities that the delay resulting from that defendant's breach of the standard of care caused or contributed to the plaintiff's injuries?

If the answer to that question is "yes", in respect of each individual defendant:

(iii) How did this defendant breach the standard of care? Please provide clear and specific answers.

In such cases, the jury instructions should avoid use of the word “necessary” in describing the “but for” test.

Did the legal errors deprive Mr. Sacks of a fair trial?

Upon reviewing the jury’s answers to questions, Lauwers J.A. decided that the jury preferred the causation theory of the defendants. Thus, in his view, “not even perfect jury questions and instructions would have changed the verdict.”

Practice Tips

- Leave to appeal to the Supreme Court of Canada is being sought in respect of this decision. Stay tuned - if leave is obtained, the discrepancy between *Surujdeo* and *Sacks* will hopefully be resolved.
- In the interim, if you are plaintiff’s counsel in a multi-tortfeasor jury trial, ensure that the causation questions use the language of “cause or contribute to” instead of “necessary cause.” Also ensure that the jury charge adequately explains that a “but for” cause need not be the sole cause of an injury. Multiple tortfeasors can collectively be the but-for causes of an injury.

7. Beneficiary Designations

Moore v. Sweet, 2017 ONCA 182 (Strathy C.J.O. and Blair J.A., Lauwers J.A. dissenting), allowing the appeal from the judgment of Wilton-Siegel J. of the Superior Court of Justice, dated June 17, 2015.

The Moores were married for more than 20 years and had three children together. They separated in December 1999 and divorced in 2003. Up until September 2000, Ms. Moore was the named beneficiary of a life insurance policy on the life of Mr. Moore. She was not designated as an irrevocable beneficiary.

The application judge made the uncontested factual finding that there was an oral agreement between the Moores made in 2000 to the effect that Ms. Moore would pay the premiums and be entitled to the proceeds on Mr. Moore’s death.

The application judge found that Mr. Moore and Ms. Sweet began living together in the summer of 2000. Contrary to his agreement with Ms. Moore, in September 2000, Mr. Moore changed the beneficiary under the policy from Ms. Moore to Ms. Sweet by executing a change of beneficiary form that designated Ms. Sweet as an irrevocable

beneficiary under the policy pursuant to the *Insurance Act*, R.S.O. 1990, c. I.8. He did not advise Ms. Moore of this change and she continued to pay the policy premiums.

Mr. Moore and Ms. Sweet lived together in Ms. Sweet's apartment until Mr. Moore's death 13 years later. According to Ms. Sweet, Mr. Moore made the change in the policy designation so that she would not need to worry about how to pay rent or buy her medications in the event that he passed away before her. The change in beneficiary was effected after discussions with Ms. Moore's brother-in-law, a life insurance broker who was married to Ms. Moore's sister.

The Moores entered a separation agreement in May 2002 whereby Mr. Moore agreed to convey his one-half interest in the matrimonial home to Ms. Moore. The separation agreement was silent about the policy.

Upon Mr. Moore's death, there was a dispute about who was entitled to the proceeds of the life insurance policy.

The application judge ruled in Ms. Moore's favour, finding that the oral agreement took the form of an equitable assignment to Ms. Moore of Mr. Moore's equitable interest in the proceeds of the policy. He held that the policy proceeds of $250,000 were held impressed with a constructive trust in favour of Ms. Moore and she was entitled to recover them based on unjust enrichment. Ms. Sweet appealed.

Held: Appeal allowed (Lauwers J.A. dissenting).

The application judge erred in relying on the doctrine of equitable assignment

The doctrine of equitable assignment was neither pleaded nor argued before the application judge. First, it was procedurally unfair to found a decision on a principle that the applicant had not relied on and on which the parties had not joined issue.

Second, the introduction of a new theory of liability in the reasons for decision raises concerns about the inherent unreliability of any finding based on that untested theory. By introducing the equitable assignment issue himself in the course of arriving at his decision, the application judge erred in law by depriving the parties – and Ms. Sweet in particular – of the ability to make a proper record relating to it, thereby rendering the result unreliable and justifying appellate intervention (at paras. 29-30).

No basis for imposing a constructive trust

The equities in this case are not heavily weighted in favour of either party. Mr. Moore breached his oral argument with Ms. Moore in designating Ms. Sweet as the irrevocable beneficiary under the policy. On the other hand, Mr. Moore was a man of limited means, and suffering from disabilities associated with his physical, mental and substance abuse issues. Ms. Sweet – who is herself disabled – took care of Mr. Moore and, for practical

purposes, provided him with a home, a place to live, and a supportive family during the 13 years of their relationship.

Turning to the test for unjust enrichment, Ms. Moore's claim must fail because the irrevocable beneficiary designation provisions of the *Insurance Act* provide a juristic reason justifying Ms. Sweet's receipt of the insurance proceeds. There is a significant difference between the status of a revocable and an irrevocable beneficiary under the *Insurance Act*: see ss. 190 and 191 (at para. 82). An irrevocable designation made in compliance with the *Insurance Act* gives the irrevocable beneficiary the statutory right to remain as the named beneficiary entitled to receive the insurance monies unless he or she consents to being removed.

The legislative regime leans heavily in favour of the payment of the proceeds of life insurance policies to those named as irrevocable beneficiaries. Disposition of law is a well-established category of juristic reason (at para. 83).

Authorities holding that the *Insurance Act* regime may be superseded by provisions in a separation agreement or other contract must be read with this in mind, as must authorities pre-dating *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 62.

The application judge did not conduct the requisite two-step analysis to the juristic reason assessment mandated by *Garland*. The juristic reason analysis was developed to inject a measure of discipline in the court's analysis and avoid the dangers of immeasurable judicial discretion. The application judge lost sight of the need to consider whether there was an existing recognized category of juristic reason that precluded recovery on the basis of unjust enrichment.

It is not necessary to resolve the debate in the jurisprudence and in academia about whether resort to the remedial constructive trust in Canada is now limited to two categories since the Supreme Court of Canada's decision in *Soulos* – unjust enrichment and wrongful acts – thereby eliminating resort to a more elastic "good conscience" trust. There is nothing in the circumstances of this case that would provide the basis for a "good conscience" constructive trust.

Ms. Moore should receive, out of the proceeds held in court, the $7,000 in premiums that she paid following the separation, with interest. However, she shall not receive the value of the pre-separation premiums because they were paid from the Moores' joint account.

Lauwers J.A., dissenting

Lauwers J.A. took a different view on the law regarding unjust enrichment and constructive trusts. He would have held that the application judge was correct to impose a constructive trust in favour of Ms. Moore on the life insurance proceeds.

Lauwers J.A. agreed with the majority that the application judge erred in finding that the deceased made an equitable assignment of the policy and its proceeds to Ms. Moore. However, in his view, that error did not affect the outcome.

Soulos left open four routes by which a court can impose the remedy of a constructive trust: (1) unjust enrichment; (2) wrongful acts or wrongful gain; (3) circumstances where its availability has long been recognized; and (4) where good conscience requires it. In relation to the last point, *Soulos* enables the law of remedial constructive trust to continue to develop with the changing needs and mores of society in order to achieve justice (at para. 186).

The application judge did not err in finding that the respondent had made out her claim in unjust enrichment. To succeed in an unjust enrichment claim, a claimant must prove: (1) an enrichment, (2) a deprivation, and (3) the absence of a juristic reason for the enrichment. Ms. Sweet did not contest the first condition was met.

With respect to the second element, Ms. Sweet contributed nothing to the acquisition of the asset in dispute. Ms. Moore was deprived of the full value of the insurance proceeds and not merely the amount of premiums she paid.

With respect to the third element, Lauwers J.A. rejected Ms. Sweet's argument that this case turns on the application of one of the accepted categories of juristic reasons that justify her enrichment, being a disposition of law. Sections 190 and 191 of the *Insurance Act* do not operate as a juristic reason for Ms. Sweet's enrichment on the facts of this case. The purpose of s. 191 is to creditor-proof the insurance proceeds, to permit them to pass outside the deceased's estate, to prevent the deceased from controlling the proceeds of the insurance policy, and to prevent the deceased from making another designation (at para. 227). The Act assumes the deceased had the right to irrevocably designate in the first place. By entering into a binding agreement with Ms. Moore, the deceased relinquished his ability to designate another party as either a revocable or irrevocable beneficiary under his insurance policy, since a person cannot give what he does not have (at para. 228).

A constructive trust was otherwise available as a remedy to Ms. Moore pursuant to the third and fourth routes identified in *Soulos*. This case is characteristic of a set of cases involving disappointed beneficiaries and life insurance proceeds. Such cases fit awkwardly in the structure of an unjust enrichment claim, since they involve three parties as opposed to two parties. The disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* – circumstances where the availability of a trust has previously been recognized – and the fourth route – where good conscience otherwise demands it, quite independent of unjust enrichment.

Practice Tips:

- The Supreme Court of Canada granted leave to appeal on August 17, 2017 (Docket No. 37546). The appeal is tentatively listed for hearing on February 7, 2018. The Supreme Court will have the final word on whether the irrevocable beneficiary designation under the *Insurance Act* constitutes a juristic reason for Ms. Sweet's enrichment, and whether a remedial constructive trust is otherwise available based on *Soulos*.
- This appeal underlines the importance of including all possible theories of liability in a notice of application. As noted in dissent by Lauwers J.A. (at para. 124): "The issue before the application judge expressed in the notice of application was whether '[t]he Deceased and the Applicant entered into an express, valid and binding contract where for consideration of the Applicant paying all Premiums for the Policy, the Applicant would receive the Benefits.' However, nothing in the notice of application addressed the remedial route to recovery, via constructive trust, express trust, equitable assignment, perfectionary trust or some other equitable mechanism." The majority observed at para. 39:

  > This Court has made it clear on a number of occasions that lawsuits are to be decided within the boundaries of the pleadings (i.e., the documents framing the issues), and based on findings and conclusions that are "anchored in the pleadings, evidence, positions or submissions of any of the parties". Otherwise, they are "inherently unreliable" and "procedurally unfair, or contrary to natural justice".

- Practitioners should inform their clients about the consequences of a revocable versus irrevocable beneficiary designation, particularly after the breakdown of a marital relationship.

Dagg v. Cameron Estate, 2017 ONCA 366, (Doherty, Brown and Miller JJ.A.), allowing an appeal from the order of the Divisional Court (Justices David Aston, Katherine E. Swinton and Lawrence A. Pattillo), dated March 31, 2016, with reasons reported at 2016 ONSC 1892, affirming the order of Justice Peter A. Douglas of the Superior Court of Justice, dated October 2, 2015, with reasons reported at 2015 ONSC 6134.

The appellant, Anastasia Cameron, married Stephen Cameron in 2003. They had two children, Derek and Meaghan. In 2010, Stephen took out a $1 million life insurance policy with Canada Life (the "Policy"). Anastasia was the named beneficiary.

Stephen and Anastasia separated in January 2013. Temporary consent orders issued in matrimonial proceedings in February and July 2013 required Stephen to maintain Anastasia as the irrevocable beneficiary on the policy and to pay spousal support, as well as child support.

Following the January 2012 separation, Stephen began a relationship with the respondent, Evangeline Dagg. Stephen was diagnosed with cancer in November 2013. Stephen and Evangeline's son, James, was born in February 2014, about three months after Stephen's death.

After his cancer diagnosis, Stephen executed both a will and a Canada Life Title Form. These documents amended the beneficiary designation on the policy as follows: (i) Anastasia, 10%; (ii) Derek Cameron, 17%; (iii) Meaghan Cameron, 19.4%; and (iv) Evangeline, 53.6%.

After learning of this change to the beneficiary designation, Anastasia brought a motion seeking to restore her designation as sole beneficiary under the policy.

The motion judge found Stephen was in breach of the consent orders and directed Canada Life to amend the beneficiary designation to return Anastasia as the sole beneficiary. Canada Life made the ordered change, effective November 20, 2013. Stephen died three days later. He left an insolvent estate.

In March 2014, Evangeline applied for dependant's relief under Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*"). She requested a declaration that s. 72 of the *SLRA* applied to the $1 million in proceeds from the Policy, "the value of which form part of the Estate and is available to satisfy the claim for support." Anastasia asserted a counter-claim seeking: (i) judgment of $1 million against Stephen's estate; (ii) a declaration the Policy not form part of Stephen's net estate under s. 72 of the *SLRA*; or, alternatively (iii) a declaration that Anastasia was a creditor of the estate with respect to the Policy and therefore its proceeds should not form part of Stephen's estate by operation of s. 72(7) of the *SLRA*.

The pertinent provisions of s. 72 of the *SLRA* state:

> 72. (1) Subject to section 71, for the purpose of this Part, the capital value of the following transactions effected by a deceased before his or her death, whether benefitting his or her dependant or any other person, shall be included as testamentary dispositions as of the date of the death of the deceased and shall be deemed to be part of his or her net estate for purposes of ascertaining the value of his or her estate, and being available to be charged for payment by an order under clause 63 (2) (f),
>
> …
>
> (f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him or her;
>
> …
>
> 72. (7) This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights.

The trial judge concluded the policy formed part of Stephen's estate, finding that Stephen was the owner of the policy at the time of his death. He went on to find that since Anastasia "had no security interest in the life insurance policy, she cannot be characterized as a 'creditor' within the meaning of section 72(7) of the *SLRA*." The Divisional Court dismissed Anastasia's appeal, concluding that Anastasia's irrevocable beneficiary designation did not give her "creditor rights" in a transaction within the meaning of s. 72(7) because she did not have a security interest in the policy.

Anastasia obtained leave to appeal to the Court of Appeal. Although the parties settled before the appeal was heard, the court exercised its discretion to determine the issues raised in the appeal despite its mootness. The court noted that there was a strong public interest in resolving the legal issues raised by this appeal (at para. 35):

> The parties point to the long-standing practice in this province of including in separation agreements and court spousal and child support orders provisions requiring a payor spouse to maintain life insurance coverage and name the recipient spouse and children as beneficiaries under the policy. The effect of the Divisional Court's decision is to expose such life insurance proceeds to competing claims under the *SLRA* from other children and former or subsequent spouses of the deceased payor.

Held: Appeal allowed. Order granted declaring Anastasia is entitled to payment of the policy's proceeds to the extent of Stephen's support obligations, past and future, existing at the time of his death, and calculated in accordance with the terms and duration of the support orders in effect at the date of his death.

The court characterized the issue on appeal as follows (at para. 38):

> Where a support payor owns a life insurance policy and has been required by court order to name the spousal or child support recipient as the irrevocable beneficiary of the policy, upon the payor's death what rights does the support recipient have to the policy's proceeds in the face of a competing claim by another dependant of the deceased brought under Part V of the *SLRA*? More specifically, what rights does the support recipient have to the policy's proceeds under s. 72(7) of the *SLRA* as a "creditor of the deceased in any transaction with respect to which a creditor has rights"?

Section 72 of the *SLRA* creates a mechanism by which certain assets dealt with by a deceased before his death can be clawed back into his estate and be made available "to be charged for payment" of a dependant's support order. However, it is subject to several statutory limitations, including s. 72(7), which states: "This section does not affect the rights of creditors of the deceased in any transaction with respect to which a creditor has rights." The legislative purpose of s. 72 of the *SLRA* was to prevent a testator from frustrating outstanding support obligations by transferring assets out of his own name.

A court has authority under s. 34(1) of the *Family Law Act* and s. 15.1 and 15.2 of the *Divorce Act* (see *Katz v. Katz*, 2014 ONCA 606, 377 D.L.R. (4th) 264, at paras. 73-74) to order a spouse to obtain insurance to secure payment of support payments that are binding on the payor's estate.

The parties did not dispute that the policy is a "transaction effected by the deceased before his … death" within the meaning of s. 72(1) of the *SLRA*. As a result, the proceeds were deemed to form part of Stephen's net estate. What was in dispute is the extent of Anastasia's rights to the Policy's proceeds as a creditor of the deceased under s. 72(7) of the *SLRA*.

The Divisional Court erred in holding Anastasia did not fall within s. 72(7) of the *SLRA* unless she was a secured creditor with a security interest in the policy. The statutory language clearly indicates s. 72(7) makes its protection available to any person who is a creditor of the deceased in respect of a transaction identified in s. 72(1) with respect to which the creditor has rights. One such transaction is "a policy of insurance effected on the life of the deceased and owned by him," such as the policy. The proper question to ask is what rights as a creditor of Stephen did Anastasia have in respect of the policy? (at paras. 73-74).

Where, at the time of his death, a spousal or child support payor owns a policy of insurance that is subject to a court order requiring the designation of the support recipient as the irrevocable beneficiary of the policy, s. 72(7) protects from the claw back of s. 72(1) that part of a policy's proceeds needed to satisfy the deceased's obligations to the spousal and child support recipients, calculated in accordance with the support orders in place at the time of his death. Those obligations can include (i) any existing arrears and (ii) the present value of any future support obligations, calculated by reference to the terms and duration of the support order in place at the time of his death (at para. 77).

Such an interpretation of s. 72(7) is faithful to the scheme and object of Part V of the *SLRA*, which places limits on the reach of the claw backs contained in s. 72(1). It also harmonizes the operation of Part V of the *SLRA* with the insurance beneficiary-designation powers granted to courts under family law legislation. By "clawing back" into the deceased's net estate only that portion of the proceeds of a life insurance policy in excess of the amount required to satisfy the deceased's family law support obligations, funds may be made available to support his other dependants while, at the same time, discharging his existing family law support obligations (at para. 78).

Under this interpretation, Anastasia would not be entitled to the entire $1 million policy, if in excess of Stephen's spousal and child obligations to her. The rights of Anastasia as a creditor flowed from court orders, and as such, her rights could be no greater than what the courts could confer under such orders.

Consequently, should Stephen's support obligations to Anastasia and their children, calculated by reference to the support order in effect at the time of his death, equal or exceed the policy's proceeds, Anastasia's rights as a creditor under s. 72(7) would see

the entire proceeds paid to her. If the support obligations are less than the policy's proceeds, Anastasia would receive the amount needed to satisfy Stephen's support obligations, and the balance would be available as part of Stephen's net estate to satisfy any support granted to Evangeline and James under Part V of the SLRA.

Practice Tips:

- If parties intend a life insurance policy to operate as a kind of "stand alone" benefit upon the payor's death that is not linked to an obligation to pay child or spousal support, the parties may confirm such a bargain in a separation agreement: *Turner v. DiDonato*, 2009 ONCA 235, 95 O.R. (3d) 147, at para. 38.
- It is always open to parties to matrimonial disputes to structure their affairs to avoid the effect of s. 72(1) of the *SLRA*. In appropriate cases, parties can request a court to include in support orders provisions dealing with the effect of the payor's death on support obligations then outstanding or due: *Decaen v. Decaen*, 2013 ONCA 218, 303 O.A.C. 261 (Ont. C.A.), at paras. 70, 77.

8. Partial Summary Judgment

Butera v. Chown, Cairns LLP, 2017 ONCA 783, (Juriansz, Pepall and Miller JJ.A.) allowing an appeal from the judgment of Belobaba J. of the Superior Court of Justice, dated May 27, 2016, with reasons reported at 2016 ONSC 3134.

The plaintiffs/appellants sued Mitsubishi for damages for breach of contract, misrepresentation, negligence, and breaches of the provisions of the *Arthur Wishart Act, Franchise Disclosure, 2000*, S.O. 2000, c. 3.

Mitsubishi moved for summary judgment on the basis that the applicable two-year limitation period had expired. The plaintiffs conceded that the applicable limitation period was two years.

Justice Hambly granted summary judgment in favour of Mitsubishi and dismissed the action based on the limitation period defence. In the event he was wrong in that conclusion, Hambly J. determined that Mitsubishi made no misrepresentations to the plaintiffs and that the *Arthur Wishart Act* did not apply, or alternatively, that Mitsubishi made no representation that would give rise to a cause of action under that Act

The plaintiffs appealed, taking the position for the first time that a six-year limitation period applied. Mitsubishi successfully struck that ground of appeal. The Court of Appeal dismissed the appeal, agreeing that the action was time-barred by the two-year limitation period. The Court of Appeal did not comment on Hambly J.'s *obiter* findings.

The plaintiffs then sued the respondents, their solicitors in the action against Mitsubishi, for negligence. The plaintiffs stated that they lost the opportunity on appeal to argue the merits of their claims against Mitsubishi because the respondents had failed to take the

position in the original action that a six-year limitation period applied (under the predecessor statute to the *Limitations Act, 2002*). They claimed $5 million in damages flowing from their lost opportunity to argue the merits of the claims advanced in their original action against Mitsubishi.

The defendants ultimately moved for partial summary judgment, arguing that there was no genuine issue requiring a trial on the issue of common law and statutory misrepresentation. The motion judge allowed the motion for partial summary judgment. He concluded there was no indication in the notice of appeal of any intention to appeal Hambly J.'s finding that there were no misrepresentations.

The plaintiffs appeal on the grounds that: (i) the motion judge erred in concluding that they had not appealed the misrepresentation finding; and (ii) the motion judge erred in failing to consider the advisability of awarding partial summary judgment.

Held: Appeal allowed. Award of partial summary judgment set aside.

1. Did the motion judge err in concluding that the appellants had not appealed the misrepresentation finding?

The motion judge erred in law in framing the issue as an analysis of whether there was an appeal from the "finding" of no misrepresentation. While issue estoppel may be based on reasons alone (see Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham, ON: LexisNexis Canada, 2015) at pp. 16-18), an appeal is from an order or a judgment, not from the reasons for decision: *Fram Elgin Mills 90 Inc. v. Romandale Farms Ltd.*, 2016 ONCA 404, 131 O.R. (3d) 455, at para. 33; and *Glennie v. McD. & C. Holdings Ltd.*, [1935] S.C.R. 257, at p. 268 (at para. 16).

The appellants appealed from the judgment of Hambly J. and asked that it be set aside. As a matter of law, this included the claims based on misrepresentation. It was implicit from the appellants' notice of appeal – and clear from their factum – that they were appealing the judgment that encompassed misrepresentation. One of the four grounds of appeal was that Hambly J. erred in applying the then-applicable "full appreciation test", which would have put in issue the misrepresentation claims if the limitation period ruling was overturned.

2. Partial Summary Judgment

The motion judge made an extricable error in principle in failing to consider the advisability of partial summary judgment in the context of the litigation as a whole. In *Hryniak v. Mauldin*, 2014 SCC 7, [2017] 1 S.C.R. 87, Karakatsanis J. observed that it may not be in the interests of justice to use the new fact-finding powers to grant partial summary judgment if other claims will proceed to trial in any event. Since *Hryniak*, this court has considered partial summary judgment in multiple cases and analyzed the issue from the perspective of whether (i) there was a risk of duplicative or inconsistent findings at trial and whether (ii) granting partial summary judgment was advisable in the context of the

litigation as a whole: see *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438 and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561

In addition to the danger of duplicative or inconsistent findings, partial summary judgment raises further problems that are anathema to the objectives underlying *Hryniak*. First, such motions delay the resolution of the main action. Second, a motion for partial summary judgment may be very expensive. Third, judges are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action. Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial, therefore increasing the danger of inconsistent findings (at paras. 30-33).

When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner (at para. 34).

Here, the action is proceeding to trial on the *Arthur Wishart Act* claims, which include allegations of a breach of the duty of fair dealing and deficient disclosure, the claims in negligence and for breach of contract. These claims are intertwined with the misrepresentation claims. An award of partial summary judgment in these circumstances may lead to inconsistent results to the extent the misrepresentation claims were not barred due to a limitation period. Considering the litigation as a whole, partial summary judgment does not serve the objectives of proportionality, efficiency, and cost effectiveness.

Practice Tips:

- An appeal is from the order not the reasons: remember this when identifying your grounds of appeal and bear in mind that a party cannot appeal from an order that is in its favour, even if you think the reasons for the order are incorrect.
- Partial summary judgment is a rare procedure reserved for issues that may be readily bifurcated from those in the main action.
- Note the Court of Appeal's remarks about the impact of *Hryniak* on motion judges' workload (at para. 32):

> Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since *Hryniak*, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.