ONCA provides direction on use of AB settlement information at trial

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The Ontario Court of Appeal's recent decision in *Girao v. Cunningham*, 2020 ONCA 260, provides important direction and guidance to trial counsel in addressing many evidentiary and procedural issues, including: joint documents briefs and tendering evidence, including expert evidence, dealing with self-represented litigants, striking juries, and the admissibility of statutory accident benefits (AB) settlements at the trial of tort claims arising from motor vehicle accidents.

Although this commentary focuses on the evidentiary issues surrounding AB payments at the trial of a tort claim, it is a must-read for all trial lawyers given its broader focus on trial procedure.

Background

The plaintiff immigrated to Canada from Peru in 1999, where she had been employed by a commercial bank and hoped to do the same work in Canada. However, unable to overcome her difficulty with the English language, she worked as a cleaner on the date of the accident.

The action arose out of a motor vehicle accident occurring on June 19, 2002. In 2006, she settled her AB claims, for a total amount of nearly $160,000. The plaintiff's AB claim was supported by several expert reports, including a series of reports summarized and gathered into a single report by Dr. Harold Becker.

By the time of the trial (over 15 years after the accident), she was on disability, receiving Ontario Disability Support Program (ODSP) payments.

Procedural history

At the trial of the tort claim, the plaintiff represented herself and relied on a Spanish interpreter while a total of four defence counsel represented two defendants. The plaintiff was successful in establishing that the defendant driver was liable for the accident and the jury awarded $45,000 in general damages and $30,000 in special damages for past loss of income. The defendant driver, however, was successful on the

threshold motion, thereby wiping out the general damages award. Further, the plaintiff's special damages award was reduced to zero after accident benefits were deducted. As a result, the plaintiff was ordered to pay the defendant driver costs in the amount of $311,845.43. She appealed.

The Court of Appeal allowed the plaintiff's appeal and ordered a new trial, on the basis that this was one of those rare civil cases in which the "interests of justice plainly required that to be done." In doing so, the Court of Appeal highlighted four elements of "substantial trial unfairness" that required a new trial:

1. the 16 volume "Joint Trial Brief," which defence counsel prepared unilaterally and selectively redacted, served on the plaintiff on the eve of trial, and tendered without reaching a consensus with the plaintiff on the admissibility of the documents;
2. the treatment of expert evidence as the plaintiff's expert evidence was effectively disqualified while the defence was permitted to enter hearsay evidence of an expert without submitting the expert for cross-examination, despite the plaintiff's objection;
3. the defence's use of information about the plaintiff's AB settlement, which was not relevant based on the pleadings, but was highly prejudicial to the plaintiff and used to advance the theory that the plaintiff was malingering, which had not been pleaded by the defence (discussed below); and
4. the trial judge and defence counsel fell short in exercising their roles consistent with relevant principles and ethical duties when dealing with a self-represented litigant at trial.

Use of information about insurance and AB settlements

The theory advanced at trial by the defence was that that motor vehicle accident was minor and not causally related to the plaintiff's physical, emotional, psychiatric, or mental problems. The argument went that the statutory accident benefit settlement provided the plaintiff with more money, over four years, than she would have earned as a cleaner, and that accounted for her failure to get new employment and for her approach to this action. It was argued that she was malingering.

The Court of Appeal noted that the AB settlement played an "out-sized" role in the defence's strategy, underpinning attacks on the plaintiff's credibility and providing a basis for the suggestion that she was malingering. Noting that the mention of insurance during trial no longer necessarily results in the jury's automatic discharge (as courts understand that juries share the general public awareness that motor vehicles are insured), the Court of Appeal ultimately held that the information about the AB settlement was not properly admitted.

The Court of Appeal reviewed the principles governing the admissibility of AB settlements, which include:

- The trial judge has broad discretion to control the proceedings to ensure trial fairness;
- Ontario's hybrid motor vehicle accident compensation system is primarily concerned with the adequate compensation of injured persons. At the trial of a

tort claim, it falls to the jury to award damages on a gross basis and to the trial judge to deduct collateral benefits;
- The trial judge must decide contextually whether and to what extent evidence about the AB settlement is to be admitted, which involves first assessing relevance and then whether the probative value of the evidence would outweigh its prejudicial effects;
- Evidence regarding some of the individual benefits received in the AB settlement would be relevant and admissible if the allegation were made that a plaintiff's abuse of a benefit would have an impact on the calculation of tort damages. For example, if the defence pleads that the plaintiff failed to use the earmarked settlement proceeds to mitigate certain related future losses, then details of those payments will be directly relevant to whether the defendant is liable for future losses;
- The *totality* of the AB settlement would rarely be relevant and would usually be more prejudicial than probative, particularly in a jury trial, even when the defence alleges that the plaintiff is malingering or lacks the motivation to work;
- There are public policy grounds for being cautious in admitting evidence of an AB settlement as it may effectively subject the plaintiff to "double jeopardy". The Court of Appeal cited Justice Leach in *Ismail v. Fleming* for the proposition that the "use of collateral entitlements premised on *disability* to support arguments of *ability*, in order to undermine residual claims for recovery not addressed by such collateral benefits, seems not only ironic but unfair;" and
- Where evidence of an AB settlement is before a jury, the jury instructions should carefully explain how the motor vehicle accident compensation system functions in Ontario, including the plaintiff's entitlement to statutory accident benefits, and the distinct roles of the trial judge and the jury in setting the tort damages and accounting for benefits received. The jury should be instructed not to reduce the award of damages because it believes that the benefits have compensated the plaintiff adequately for the accident.

The Court of Appeal decided that since there was nothing in the Statement of Defence putting the AB settlement in issue, that evidence was improperly admitted and could not be used to bolster the malingering theory. The Court of Appeal was particularly critical of the defence's attempt to portray the AB settlement as an "unearned windfall", and the tort claim as another potential unearned windfall.

Takeaways

As noted above, this decision is a must-read for its guidance on trial conduct and procedure:

- Regarding the involvement of self-represented litigants:
    - The trial judge has "special duties" to self-represented litigants vis-à-vis procedure and rules of evidence.
    - Trial counsel have general ethical obligations to bring to the court's attention binding authorities that are on point but not raised by an opponent, and to assist the trial judge, as officers of the court, with complex legal issues by, for example, preparing briefing notes upon request.

- With respect to evidentiary issues that are particularly common at personal injury trials:
    - Care must be taken to ensure that documents entered into evidence are properly filtered by the legislation and first principles, and counsel must be proactive and cooperative in preparing Joint Document Briefs with self-represented litigants.
    - A Joint Document Brief should be “jointly” prepared.

- As to the use and reliance of the AB settlement at the trial of a tort claim:
    - Care must be taken in drafting the pleadings to ensure as broad use as possible can be made of what, at that point, will likely be the future settlement of the AB claim.
    - Where aspects of the AB settlement are properly admitted into evidence, the totality of the AB settlement will rarely pass the relevance and prejudicial affect/probative value tests.

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