Introduction

In Ontario a person hurt or killed in a car, truck, bus, motorcycle, snowmobile or all-terrain vehicle crash is usually entitled to at least\(^1\) two different sources of compensation as long as the crash was at least partially caused by someone else.

The first source of compensation is through a civil action for damages. This is commonly known as a tort claim. In a tort claim, damages are available to the injured party through the civil court system. Theoretically, a tort claim should provide for full restoration of an injured person’s economic losses but, in practice, compensation from a civil action often falls far short of what is theoretically available.

The second source of compensation available to the injured person is benefits through the first party no-fault statutory accident benefits (“SABS”) system.\(^2\)

Modern tort law in Ontario has existed since at least Donoghue v. Stevenson [1932] AC 562 (H.L.). The no-fault SABS system has existed in various forms since 1990. Notwithstanding the passage of time, many people involved in personal injury law in Ontario still have misconceptions about the damages/benefits available under the two systems. This paper will try to clear up those misconceptions by providing a comparative review of the types of damages/benefits available under the tort and SABS systems.

**Ontario Statutory Accident Benefits**

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\(^1\) It is beyond the scope of this paper but people injured in Ontario auto accidents may also be eligible to receive short-term and long-term disability benefits through group or private insurance policies, Canada Pension Plan Disability Benefits, Ontario Works or Ontario Disability Support Program Benefits, worker’s compensation benefits, gratuitous gifts, etc.

\(^2\) O. Reg. 34/10 – Statutory Accident Benefits Schedule – Effective September 1, 2010 (hereinafter “SABS”)
Statutory accident benefits ("accident benefits") are a type of no-fault insurance coverage attached to every automobile insurance policy in Ontario. The law that governs accident benefits is a regulation made under the \textit{Insurance Act}. The law governing accident benefits was amended for motor vehicle accidents occurring on or after September 1, 2010. All references in this paper are to the current legislation. All accident benefits described assume that the insured person has not purchased any optional coverage.

\textbf{How does a person qualify for accident benefits?}

If a person in Ontario suffers an impairment that is directly caused by the use or operation of an automobile then that person will be entitled to apply for accident benefits. This is true regardless of whether or not the injured party was an insured person or the spouse or dependent of an insured person under a policy of auto insurance. This is also true even if the motor vehicles involved in the accident were uninsured or fled the scene of the accident. As mentioned above, fault for the accident has no role to play in determining whether or not someone is eligible for these benefits.

The only restrictions on benefits available that are related to the circumstances of the accident are contained in section 31 of the \textit{SABS}. In a nutshell, this section sets out that income replacement benefits, non-earner benefits, visitor expenses, lost educational expenses and housekeeping and home maintenance benefits are not available to the driver of the vehicle if he or she was driving at the time of the crash without a valid driver’s licence, without valid insurance or without consent of

\begin{itemize}
\item \textsuperscript{3} Ibid.
\item \textsuperscript{4} For an additional premium, policy holders can buy optional coverage that, along with other options, can increase medical and rehabilitation coverage to $100,000 in non-catastrophic cases or, for a larger premium, $1,000,000 in non-catastrophic cases and $2,000,000 in catastrophic cases.
\item \textsuperscript{5} Impairment is defined as a “loss or abnormality of a psychological, physiological or anatomical structure or function” in Section 3(1) of the \textit{SABS}.
\item \textsuperscript{6} Surprisingly the word “automobile” is not defined in the \textit{SABS}. However the word automobile is defined as "a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and a vehicle prescribed by regulation to be an automobile." in s. 224 of the \textit{Insurance Act}, R.S.O. 1990, c. I.8. so as long as the vehicle was deemed to be an automobile by a regulation (e.g. snowmobile) or the vehicle required insurance under any relevant statute at the time of the accident then it will be considered an automobile for \textit{SABS} purposes.
\item \textsuperscript{7} In which case accident benefits will be paid by the Motor Vehicle Accident Claims Fund. For more information please visit: http://www.fsco.gov.on.ca/en/auto/mvact/Pages/faq.aspx (visited February 15, 2015)
\end{itemize}
the owner. In addition, if the driver is convicted of certain criminal offences relating to the accident then the above noted benefits are taken away. Medical and rehabilitation benefits and attendant care benefits are not reduced by this section.

Causation in accident benefits

A claimant only needs to prove that the accident "materially contributed" to his or her impairments to make out claims for accident benefits. The “but for” test is not the proper test for causation in accident benefits claims. The material contribution test only requires the insured to prove that the accident materially contributed to his or her impairments. Materiality is defined as anything above the “de minimis” range.

What benefits are available?

There are three categories of injuries under the current SABS. These are the minor injury guideline (“MIG”), catastrophic impairment claims (“CAT”) and all other claims.

For accidents occurring on or after September 1, 2010, the following benefits are available to an injured party who meets the applicable tests but are not CAT or MIG:

- A maximum of $50,000 in reasonable and necessary medical and rehabilitation benefits payable over 10 years following the accident;
- All reasonable and necessary attendant care benefits to a maximum of $3,000 per month (up to a maximum of $36,000). This benefit is only payable for the first 104 weeks following the accident or until $36,000 is exhausted, whichever is earlier. These benefits are

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8 operating an automobile while the ability to operate the automobile is impaired by alcohol or a drug, operating an automobile while the concentration of alcohol in the operator’s blood exceeds the limit permitted by law, failing to comply with a lawful demand to provide a breath sample, or any other criminal offence, whether or not the offence is related to the operation of an automobile. O. Reg. 34/10, s. 31 (5).
9 Ghabn v Dominion of Canada General Insurance Company, FSCO A12-002238 (December 4, 2014)
10 See Section 15 (1) of the SABS.
11 Section 20(1)(b) of the SABS sets out that if the insured person was under 15 years of age at the time of the accident the medical/rehabilitation benefits are payable to the insured person’s 25th birthday
payable only to a professional service provider or to a family member who has sustained an economic loss in connection with providing the attendant care.\textsuperscript{12} For accidents on or after February 1, 2014 the amount payable to a family member for attendant care cannot exceed the amount of economic loss incurred as a direct result of providing the attendant care.\textsuperscript{13};

- An income replacement benefit of a maximum of $400 per week or 70\% of weekly pre-accident gross income, whichever amount is lower. These benefits are payable up to age 65 with a reduced benefit thereafter but the test to qualify for the benefit becomes stricter after 104 weeks\textsuperscript{14};

- Lost educational expenses of up to $15,000;

- Visitor expenses for 104 weeks following the accident\textsuperscript{15};

- A non-earner benefit of $185 per week\textsuperscript{16} if the injured party was not working at the time of the collision and now suffers a complete inability to carry on a normal life. There is a six month waiting period before the injured person can qualify for this benefit. This benefit is payable up to age 65 with a reduced benefit thereafter; and,

- Reimbursement for damaged clothing, glasses, hearing aid, etc.

In the event of a death - the following benefits are available:

- a death benefit of $25,000 to a spouse, $10,000 to each dependent and one benefit of $10,000 to be split amongst the persons in

\textsuperscript{12} Section 3(7) of the \textit{SABS}.

\textsuperscript{13} Section 19(3) of the \textit{SABS}.

\textsuperscript{14} 6. (2) (b) after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience.

\textsuperscript{15} See section 22 of the \textit{SABS}. These expenses are only payable for spouse, children, grandchildren, parents, grandparents, brothers and sisters of the injured party as well as an individual who was living with the insured at the time of the accident, a person who has a settled intention to treat the injured person like a child or a person who the insured person has a settled intention to treat like a child.

\textsuperscript{16} In certain situations this can increase to $320 per week. See s. 12(3) of the \textit{SABS}.
respect of whom the deceased was a dependant at the time of the accident\(^\text{17}\); and,

- a funeral benefit of $6,000.

**MIG claims**

Section 40 and Section 18 of the *SABS* sets out that if a person sustains an injury that is “predominately” a minor injury\(^\text{18}\) that person is limited to a maximum of $3,500 in medical and rehabilitation benefits and is not eligible for any attendant care benefits. Injured people who fall under this guideline are still eligible for income replacement benefits or non-earner benefits if they meet the applicable test in the *SABS*.

**Catastrophic claims**

If the insured person suffers an impairment which rises to the level of catastrophic impairment\(^\text{19}\) then the available medical and rehabilitation benefits increase

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\(^\text{17}\) See section 26 of the *SABS*. Other benefits are available.

\(^\text{18}\) a) minor injury means a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. This term is to be interpreted to apply where a person sustains any one or more of these injuries.

b) sprain means an injury to one or more tendons or ligaments or to one or more of each, including a partial but not a complete tear.

c) strain means an injury to one or more muscles, including a partial but not a complete tear.

d) subluxation means a partial but not a complete dislocation of a joint.

e) whiplash injury means an injury that occurs to a person’s neck following a sudden acceleration-deceleration force.

f) whiplash associated disorder means a whiplash injury that:

(i) does not exhibit objective, demonstrable, definable and clinically relevant neurological signs, and

(ii) does not exhibit a fracture in or dislocation of the spine.


\(^\text{19}\) Section 3(2) of the *SABS*:

For the purposes of this Regulation, a catastrophic impairment caused by an accident is,

(a) paraplegia or quadriplegia;

(b) the amputation of an arm or leg or another impairment causing the total and permanent loss of use of an arm or a leg;

(c) the total loss of vision in both eyes;

(d) subject to subsection (4), brain impairment that results in,

(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or
to $1,000,000 payable over the insured person's lifetime and the available attendant

care benefits increase to a maximum of $6,000 per month payable over the person's

lifetime or until $1,000,000 has been exhausted. The test for these benefits (i.e.

"reasonable and necessary") and the economic loss requirements remain in force in
catastrophic cases.

In addition, insured people with catastrophic impairments are eligible for

all reasonable and necessary housekeeping and home maintenance services up to a

maximum of $100 per week for life. Catastrophic claimants are also eligible for a
caregiver benefit of $250 per week for the first person in need of care and $50 per week

for each additional person in need of care. The caregiver benefit is payable for the first

104 weeks of disability unless as a result of the accident the insured person is suffering

a complete inability to carry on a normal life.20 If the insured person has a complete

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in
Jennett, B. and Bond, M., Assessment of Outcome After Severe Brain Damage, Lancet i:480, 1975,
according to a test administered more than six months after the accident by a person trained for that

purpose;

(e) subject to subsections (4), (5) and (6), an impairment or combination of impairments that, in accordance with
the American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993,
results in 55 per cent or more impairment of the whole person; or

(f) subject to subsections (4), (5) and (6), an impairment that, in accordance with the American Medical
Association’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in a class 4
impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural
disorder.

(3) Subsection (4) applies if an insured person is under the age of 16 years at the time of the accident and none of the Glasgow
Coma Scale, the Glasgow Outcome Scale or the American Medical Association’s Guides to the Evaluation of Permanent
Impairment, 4th edition, 1993, referred to in clause (2) (d), (e) or (f) can be applied by reason of the age of the insured person.

(4) For the purposes of clauses (2) (d), (e) and (f), an impairment sustained in an accident by an insured person described in
subsection (3) that can reasonably be believed to be a catastrophic impairment shall be deemed to be the impairment that is most
analogous to the impairment referred to in clause (2) (d), (e) or (f), after taking into consideration the developmental implications
of the impairment.

(5) Clauses (2) (e) and (f) do not apply in respect of an insured person who sustains an impairment as a result of an accident
unless,

(a) in the case of an impairment that includes a brain impairment, a physician states in writing that the insured
person’s condition is unlikely to cease to be a catastrophic impairment;

(b) in the case of an impairment that is only a brain impairment, a neuropsychologist states in writing that the
insured person’s condition is unlikely to cease to be a catastrophic impairment; or

(c) two years have elapsed since the accident.

(6) For the purpose of clauses (2) (e) and (f), an impairment that is sustained by an insured person but is not listed in the
American Medical Association’s Guides to the Evaluation of Permanent Impairment, 4th edition, 1993 is deemed to be the
impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person.

20 See Section 3(1) and 13 of the SARS.
inability to carry on a normal life the caregiver benefit remains payable up until the youngest child’s 16th birthday.\textsuperscript{21} Case Management services are also available to people who have suffered a catastrophic impairment. The cost of case management is payable out of the medical and rehabilitation limits described above.

In addition, the following benefits apply in catastrophic cases:

- An income replacement benefit of a maximum of $400 per week or 70% of weekly pre-accident gross income, whichever amount is lower. These benefits are payable up to age 65 (with a reduced benefit thereafter) but the test to qualify becomes more strict after 104 weeks\textsuperscript{22};
- Lost educational expenses of up to $15,000;
- Visitor expenses for life\textsuperscript{23};
- A non-earner benefit of $185 per week\textsuperscript{24} if the injured party was not working at the time of the collision and now suffers a complete inability to carry on a normal life. There is a six month waiting period before you can qualify for this benefit. This benefit is payable up to age 65 with a reduced benefit thereafter; and,
- Reimbursement for damaged clothing, glasses, hearing aid, etc.

It is important to note that even though an insured person may qualify for more than one weekly benefit (i.e. income replacement benefit, caregiver benefit or non-earner benefit) the insured person must elect to receive only one of these weekly benefits and in most circumstances cannot re-elect.

**Tort Damages**

\textsuperscript{21} or for life, if the person in need of care requires that care because of physical or mental incapacity. See Section 3(1) and 13 of the SABS.
\textsuperscript{22} See footnote 14.
\textsuperscript{23} See section 22 of the SABS. These expenses are only payable for spouse, children, grandchildren, parents, grandparents, brothers and sisters of the injured party as well as an individual who was living with the insured at the time of the accident, a person who has a settled intention to treat the injured person like a child or a person who the insured person has a settled intention to treat like a child.
\textsuperscript{24} In certain situations this can increase to $320 per week. See s. 12(3) of the SABS
The tort system is designed to put the innocent injured party in the financial position that he or she would have been if the injury had not occurred. In addition to non-pecuniary damages for pain, suffering and loss of enjoyment of life, an injured person with a tort claim is theoretically entitled to compensation for virtually all of his or her economic losses arising from the injury. This includes past and future loss of income, past and future health care expenses, past and future housekeeping and home maintenance expenses and any other out of pocket expenses.

**Contributory Negligence**

Damages in tort are dependent on proving negligence and fault on the defendant. If a plaintiff is found to be partially responsible for their own injuries their damages are reduced proportionally. For example, if an injured person is found to be 25% at fault for failing to wear a seatbelt, the injured person can only recover 75% of the damages that are assessed by the court.

**Causation in Tort Claims**

The Supreme Court of Canada has repeatedly reminded us that, as a general rule, a plaintiff cannot succeed unless he or she shows as a matter of fact that she would not have suffered the loss “but for” the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant’s negligence caused her loss. Scientific proof of causation is not required.

**Special vs. General Damages**

Many people get confused about the difference between special and general damages. Ken Cooper-Stephenson defines special damages as constituting all

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25 For motor vehicle accident claims in tort, the injured party can only collect damages for pain, suffering and loss of enjoyment of life and future care costs if they meet the threshold level of “permanent serious impairment of an important physical, mental or psychological function” set out in Ontario Regulation 461/96.

26 In motor vehicle cases s. 267.5 (1)(ii) of the *Insurance Act* limits tort recovery for past loss of income to 70% of gross before trial. Future loss of income is payable at 100% of gross.

27 See Footnote 18.


pre-trial pecuniary losses and general damages as constituting all future pecuniary loss and all non-pecuniary losses. Special damages must be specifically pleaded and proved.

**Non-pecuniary losses**

**Pain, Suffering and Loss of Enjoyment of Life**

In an Ontario tort case, the injured person is entitled to damages for their pain, suffering and loss of enjoyment of life. These damages are supposed to compensate the injured person for all of the intangible non-economic losses associated with their injuries (e.g. loss of ability to do hobbies, loss of emotional well-being, etc.). Non-pecuniary damages are subject to a common law cap that was established by the Supreme Court of Canada in a trilogy of cases in 1978. Adjusted for inflation that cap is $354,701 as of December 2014.

In an Ontario motor vehicle tort case, a claim for pain, suffering and loss of enjoyment of life may only be advanced if the injured person’s injuries pass a statutory threshold. In other words, the injured person must prove that they have sustained a permanent serious impairment of an important physical, mental or psychological function, or a permanent serious disfigurement. The evidence that must be led to pass the threshold is set out in Sections 4.2 and 4.3 of Ontario Regulation 461/96.

In addition, any award for pain, suffering and loss of enjoyment of life in an Ontario motor vehicle tort case is subject to a $30,000 vanishing deductible. The deductible vanishes if the award for pain, suffering and loss of enjoyment of life exceeds $100,000. Put another way, if the jury awards a plaintiff $100,000 for pain, suffering and loss of enjoyment of life, that plaintiff receives $70,000 for that head of damages. If the

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33 This applies to injuries suffered in any motor vehicle accident after October 1, 2003.
34 See 267.5(7) of the Insurance Act.
jury awards the same plaintiff $100,001 or more for their pain, suffering and loss of enjoyment of life, the plaintiff recovers the entire amount awarded. In jury cases, the jury is not told about the deductible or the threshold.\textsuperscript{35}

In 2012 the Ontario Court of Appeal confirmed that one deductible applies for each accident in cases where the plaintiff’s injuries were caused by more than one motor vehicle accident.\textsuperscript{36}

\textbf{Claims for Loss of Guidance, Care and Companionship}

As a result of section 61 of the \textit{Family Law Act}, a person is injured or killed by the fault or neglect of another, that person’s children, grandchildren, parents, grandparents, brothers and sisters may claim damages for the loss of guidance, care and companionship that those family members might reasonably have expected to receive from the person if the injury or death had not occurred.\textsuperscript{37} These are non-pecuniary damages and are available whenever a family member is distressed about a reduction in the quality of their relationship with the injured person due to the injury or death of the family member.

There is no statutory or common law cap on awards for loss of guidance, care and companionship. However, the Court of Appeal has indicated that damages of $135,000 are not so high as to warrant appellate intervention to lower the award.\textsuperscript{38}

If the person was killed in a motor vehicle accident no statutory deductible applies to damages awarded for loss of guidance, care and companionship. However, if the person was only injured in a motor vehicle accident a $15,000 vanishing deductible\textsuperscript{39} applies to an award for damages for loss of guidance, care and

\textsuperscript{35} The deductible only applies to protected defendants. These are the owner of an automobile, the occupants of an automobile and any person present at the incident. In addition, for accidents after October 1, 2003 people vicariously liable for the actions of a protected defendant cannot be liable for more damages than the protected defendant. See s. 267.5 of the \textit{Insurance Act}.
\textsuperscript{36} \textit{Martin v. Fleming}, 2012 ONCA 750
\textsuperscript{38} \textit{Vokes Estate v. Palmer}, 2012 ONCA 510.
\textsuperscript{39} The deductible only applies to protected defendants. These are the owner of an automobile, the occupants of an automobile and any person present at the incident. In addition, for accidents after October 1, 2003 people vicariously liable for the actions of a protected defendant cannot be liable for more damages than the protected defendant. See s. 267.5 of the \textit{Insurance Act}. 
companionship. The deductible vanishes if the judge or jury awards more than $50,000 for the loss of guidance, care and companionship.\textsuperscript{40}

**Pecuniary Losses in Tort**

**Past Income Loss/ Past Loss of Earning Capacity**

These claims are assessed by the trier of fact determining how much money the injured person would have made between the date of loss and the trial if they had not been injured. Any post-injury earnings are used to reduce the size of the claim for past loss of income/loss of earning capacity.

In an Ontario motor vehicle tort case, claims for past income loss and past loss of earning capacity are further limited by Section 267.5 of the *Insurance Act*. Those claims are limited\textsuperscript{41} as follows:

1. The injured person may not claim damages for income loss suffered in the seven days after the motor vehicle accident.

2. Damages for income loss suffered more than seven days after the motor vehicle accident and before the trial of the action are limited to:

   i. 80 per cent of the net income loss during that period, if the motor vehicle accident occurred before September 1, 2010, or

   ii. 70 per cent of the amount of gross income that is lost during that period, if the motor vehicle accident occurred on or after September 1, 2010.

\textsuperscript{40} See 267.5(7) of the *Insurance Act*.

\textsuperscript{41} The reductions only apply to claims against protected defendants. These are the owner of an automobile, the occupants of an automobile and any person present at the incident. In addition, for accidents after October 1, 2003 people vicariously liable for the actions of a protected defendant cannot be liable for more damages than the protected defendant. See s. 267.5 of the *Insurance Act*. 
3. Damages for loss of earning capacity suffered after the motor vehicle accident and before the trial of the action are limited to:

i. 80 per cent of the net loss of earning capacity during that period, if the motor vehicle accident occurred before September 1, 2010, or

ii. 70 per cent of the loss of earning capacity during that period, if the motor vehicle accident occurred on or after September 1, 2010.

**Collateral Benefit Deductions**

In a tort motor vehicle accident case the tort defendant is entitled to a credit for money received before trial from other sources including accident benefits, Canada Pension Plan Disability Benefits and/or Long-Term Disability Benefits. These credits apply to pre-trial collateral payments for pre-trial health care costs, income loss and other pecuniary losses.

For future losses the tort defendant must pay the entire award at the time of Judgment. Once the award has been paid the tort defendant receives a trust or assignment of the plaintiff’s collateral benefits going forward until the amounts paid by the tort defendant have been repaid or until the collateral benefits are exhausted. The tort defendant only receives a trust or assignment of collateral benefits of the same type as the damages paid. In other words, the tort defendant does not receive an assignment of future health care collateral benefits if they have only paid damages for future income loss.

**Future Loss of Income/Loss of Earning Capacity**

Future loss of income and loss of earning capacity claims are intended to compensate the injured person for income they would have made and will now fail to

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42 See s. 267.8 of the Insurance Act.
43 See 267.8 (9) of the Insurance Act.
earn because of their injured state. The plaintiff is entitled to claim 100% of his or her post-trial gross future income loss or loss of earning capacity.

Loss of income claims and loss of earning capacity claims are very much related and often overlap. Expert accounting or economic evidence is very important when calculating these types of damages.

Future loss of income represents a quantification of earnings lost in the future due to the defendant’s negligence. This is generally calculated by determining what the injured party would have made but for the collision for the rest of their working life and reducing it by any residual earning capacity. Loss of future income is generally calculated by multiplying the annual income loss by the injured person’s expected pre-injury working life using the discount rate in Rule 53.09 of the Rules of Civil Procedure. The court therefore needs to consider pre-injury expected retirement age when calculating this loss.

Loss of earning capacity claims are the label often used in cases where the injured party may still be able to work now but only at a reduced level. The plaintiff may be claiming that the injuries will cause an early retirement or will cause them to lose out on promotions and overtime. Often these damages are calculated by applying a percentage reduction to the amount that someone would have made if they had not been hurt.

When calculating both future loss of income and loss of earning capacity, the court must take into account future negative contingencies (e.g. the plaintiff may die of cancer in 5 years, the plaintiff, if uninjured, may still have lost their job in a recession). The court also must take into account positive contingencies (e.g. the plaintiff may have been promoted, etc.).
In addition, as noted above, in motor vehicle tort cases an assignment or trust of future collateral benefits for income loss may be ordered once the plaintiff has received the full amount awarded for income loss in tort.

**The Standard of Proof in Tort for Future Economic Losses**

Given the uncertainty of proving what will happen in the future, the plaintiff must only establish that there is a reasonable chance of the future economic loss occurring. The law does not require that the plaintiff prove on a balance of probabilities that a future pecuniary loss will occur. The Ontario Court of Appeal made this point in *Schrump v. Koot*\(^{44}\). Mr. Justice Lacourcière wrote:

> In this area of the law relating to the assessment of damages for physical injury, one must appreciate that though it may be necessary for a plaintiff to prove, on a balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that future loss or damage will occur, but only that there is a reasonable chance of such loss or damage occurring...

> Speculative and fanciful possibilities unsupported by the expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries, as long as it is a substantial one, and regardless of the percentage possibility is favourable or unfavourable.\(^{45}\)

**Past and Future Health Care Costs**

\(^{44}\) *Schrump v. Koot* (1977), 0. R. (2d) 337 (C.A.).

\(^{45}\) Ibid.
The plaintiff is entitled to claim for all past and future health care costs in a tort action. The costs must be extraordinary costs that would not have been required but for the negligence of the defendant.

Any past health care costs awarded at trial are a special damage. Receipts must be provided for any out of pocket expenses incurred. In addition, any claim for past health care costs at trial must be reduced by any benefits received before trial from any collateral source including extended health care coverage and accident benefits.\(^46\)

Any claim for future health care costs must be divided into two parts. First, the initial capital costs required and second, the ongoing expenses. The ongoing expenses are calculated by using the discount rate set out in Rule 53.09 of the *Rules of Civil Procedure*. The trier of fact will also have to determine what life expectancy they assign to the plaintiff. Life expectancy will obviously impact on the amount of the award because it will impact on the number of years that future care costs are awarded for.

As with future income loss, a trust or assignment of future collateral benefits may be required following receipt of payment of the entire tort Judgment.

**Past and Future Housekeeping and Home Maintenance Costs**

The Ontario Court of Appeal provided us with guidance about the types of claims that can be advanced relating to housekeeping and home maintenance. In *McIntyre v. Docherty*, 2009 ONCA 448, the court held that the following types of damages are available:

(a) up to the date of trial, pecuniary losses arising from inefficiency in maintaining his home and completion of his pre-accident housekeeping duties and domestic responsibilities;

\(^46\) S. 267.8 (4) of the *Insurance Act.*
(b) up to the date of trial, non-pecuniary losses attributable to pain, suffering and mental anguish experienced while attempting to complete his pre-accident domestic housekeeping and home maintenance duties and his failure to complete these tasks in the same manner and quality that he had done before. This would form part of the claim for pain, suffering and the loss of enjoyment of life;

(c) up to the date of trial, compensation for any paid or gratuitous housekeeping and domestic tasks performed by anyone as a result of an inability to fully perform these tasks; and

(d) future pecuniary losses attributable to a future inability to fully or partially engage in his pre-accident domestic housekeeping and home maintenance tasks.

As with past income loss and health care costs, in motor vehicle tort cases the tort defendant is entitled to a credit for pre-trial collateral payments relating to housekeeping and home maintenance. For future pecuniary losses relating to housekeeping and home maintenance, the tort defendant may be entitled to a trust or assignment of future collateral benefits payable for ongoing housekeeping and home maintenance tasks.

**Tort dependency claims and pecuniary losses of family members**

Section 61 of the *Family Law Act*, provides that in cases where someone is killed or injured due to negligence of another person, that person’s children, grandchildren, parents, grandparents, brothers and sisters may claim for the following pecuniary losses:

(a) Actual expenses incurred for the benefit of the injured person;
(b) The value of services for nursing, housekeeping and other services provided for the injured person; and
(c) Pecuniary losses resulting from the injury or death.

In fatal cases, the loved ones who were financially dependent on the deceased person may bring a claim for the shared family income that they would have received from the deceased but for the negligence of the defendant. Section 63 of the Family Law Act provides that the court cannot take into account any sum paid or payable as a result of the death under a contract of insurance. Therefore life insurance is not deductible from any claims advanced in a fatal accident case.

In dependency claims, the court will look at how much money the family member (usually the surviving spouse) would have received from the deceased but for his or her death. If the deceased had survived, it is apparent that a certain percentage of his or her income would have gone towards his or her personal expenses (e.g. hobbies, meals, transportation, etc.). These personal expenses are often assessed at 40% of the deceased’s income and they do not form part of a dependency claim. The remaining 60% of the deceased’s income is the typical amount that a surviving spouse will advance a claim for. Each surviving minor child usually adds 4-5% to the dependency claim. The minor’s claims are limited to the years that the child was expected to remain financially dependent on the deceased. Often these claims end when the child reaches the age of 18 years or when the child is expected to finish post-secondary education. Given the complexity of these claims, it is important that plaintiffs' counsel obtain an opinion from an accountant or economist to assist them in calculating any fatality dependency claim.

It is also important to note that there are different approaches to quantifying dependency claims. If both spouses were working before the death of the loved one, should the court use a “sole dependency” or a “cross-dependency” model? In other words, should the surviving spouse receive a percentage of the joint family income or a percentage of what the deceased would have made? This is an issue that is decided on a case by case basis.

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In addition, dependency claims are often subject to a negative contingent reduction for the possibility that the surviving spouse may remarry. The court will again decide this issue based on the facts of the particular case (e.g. age of spouse, evidence about whether they are dating prior to trial, etc.).

In fatal accident claims, the family may also claim for the loss of household services that would have been provided by the deceased. Some spouses are quite handy and do many of the heavy housekeeping tasks around the home. In those cases, the cost of purchasing those services on the open market can be significant. Again it is important that plaintiff's counsel hire a life care planner to prepare an expert report about the services that must be replaced.

**Loss of Shared Family Income**

In severe injury cases, the plaintiff occasionally loses the ability to marry or form a permanent relationship of interdependency. Claims for loss of shared family income have been confirmed by the Ontario courts in cases such as *Osborne (Litigation Guardian of) v Bruce County*, (1999) O.J. No 50 (Gen Div.), *Walker v Ritchie* (2003) O.J. No 18 (S.C.J.) and *Bartosek (Litigation Guardian of) v Turret Realties Inc*, (2001) O.J. No 4735 **affd** by ONCA at (2004) O.J. No 1088 (ONCA).

The loss of shared family income claim represents the following:

1. Increased Income: The injured person’s notional spouse would likely have worked and would have increased the available discretionary income.

2. Shared Expenses: The injured person has lost the opportunity to share expenses with his notional spouse (e.g. housing and food).

3. Shared Homemaking: The injured person has lost the opportunity to share homemaking duties with his notional spouse.
Management Fee/Co-Guardianship Costs

In serious personal injury cases an amount for a management or investment counselling fee may be awarded to the plaintiff. This is a question of fact to be decided in each case.\(^\text{48}\) The purpose of a management fee is to ensure that amounts related to future needs are not exhausted prematurely due to the plaintiff's inability to manage their affairs. Depending on the needs of the plaintiff, more or less extensive assistance is required. It may also be necessary to appoint a guardian or co-guardian of the property/estate of the injured person. In those cases, the guardianship fees can be claimed in the tort claim.

The only legal principle that is applicable when assessing a need for a management fee is that the defendant must take the plaintiff as he finds him, a management fee should be awarded if the plaintiff's ability level is such that he is either unable to manage his or her affairs or lacks the acumen to invest funds awarded for future care so as to produce the requisite rate of return.

Conclusion

People injured or killed in Ontario motor vehicle accidents may have numerous types of damages/benefits available to them or their families via the SABS and tort. A working knowledge of the types of damages/benefits available under the two systems is essential for those working in the personal injury realm. It is my hope that this paper has helped clarify and compare the different categories of benefits/damages available. Questions or comments about the paper are very welcome at rmurray@oatleyvigmond.com or 1 (888) 662-2481 xt. 346.