Building Your File for the Post 104 Week World

OTLA 2014 Law Clerks Conference

SABS – When Things Go Right, When Things Go Wrong

March 27, 2014

Allen Wynperle

Personal Injury Advocates

400-25 Main St W

Hamilton, Ont

[www.wynperlelaw.ca](http://www.wynperlelaw.ca)

# ***COMPLETE INABILITY TEST UNDER THE SABS***

***INTRODUCTION***

This paper provides an update of case law with respect to the complete inability test under the SABS.

***CAUSATION***

The question of whether or not a motor vehicle accident has caused a person to be disabled has been a vexing problem for judges, lawyers and healthcare experts for many years.

Most recently the Ontario Court of Appeal has delivered its decision in Monk and ING Insurance*[[1]](#endnote-1)*. Mrs. Monk, a Registered Nurse was involved in three motor vehicle accidents. As a result of the first accident, she suffered a whiplash type injury to her neck with some numbness in both arms which dissipated. She returned to work. After her second motor vehicle accident, she suffered numbness in both arms. Following diagnostic imaging, it was realized that she had a narrowing of the spinal canal. Despite her ongoing difficulty, surgery was not required. She was however, told that surgery could be a risk in the future if any further deterioration in her condition occurred. After her second motor vehicle accident, ING settled her accident benefits for over $1 million. Mrs. Monk did return to work after her second accident but in a lesser capacity then she had prior to that accident. After her third motor vehicle accident, Mrs. Monk was suffering far more significant numbness in her arms and surgery was conducted. Unfortunately, after two surgical interventions Mrs. Monk was left an incomplete quadriplegic. She had movement of all four limbs but had difficulty with those movements.

Following review of the trial judges decision, the Ontario Court of Appeal determined that causation should be assessed using the material contribution test as outlined in Athey v. Leonati*[[2]](#endnote-2)*. In Athey*,* the Supreme Court of Canadadetermined that if the accident in question is anything greater than a negligible cause then it is material and thus, a causal link is proven.

In Monk, ING Insurance Company argued that even had Mrs. Monk not been involved in her third motor vehicle accident, she likely would have suffered future deterioration in her condition ending up in much the same circumstances (Crumbling Skull Theory).

The Ontario Court of Appeal unanimously rejected this argument stating that the Crumbling Skull Theory does not apply to accident benefits claims. The Crumbling Skull Theory can be applied in tort cases (against at-fault parties).

**INTERVENING EVENT**

***Arunasalam v. State Farm Insurance Company (FSCO P-09-00025)***

 Mr. Arunasalam was injured in a motor vehicle accident on August 31, 2006. He received income replacement benefits until he was terminated on July 24, 2007 following which he applied for arbitration.

Following the hearing, Arbitrator Bujold determined that the Applicant was entitled to income replacement benefits from July 25, 2007 to March 31, 2008. The Arbitrator’s finding that Mr. Arunasalam was not entitled to income replacement benefits after March 31, 2008, was not based on any recovery from the accident related injuries. In fact, the Arbitrator’s decision makes it clear that Mr. Arunasalam’s motor vehicle accident related injuries had not healed. Rather, the Arbitrator found that the Applicant had been diagnosed following the accident with diabetes, high blood pressure and a heart condition. As a result, the Arbitrator viewed these subsequent health conditions as an “intervening event” and concluded:

Given the extent of Mr. Arunasalam’s perceived limitations as a result of his ailments that are unrelated to the accident is difficult to imagine that he would have continued to be able to meet the heavy demands of his job at A&T beyond the date of their diagnosis, even if the accident had not happened.

 As a result the Applicant was not entitled to income replacement benefits beyond the date of this “intervening event”.

On Appeal, Director’s Delegate David Evans overturned the Arbitrator’s decision and stated the correct analysis to apply in this case was the material contribution test rather than the concept of post-accident “intervening event”. Director’s Delegate Evans went on to confirm that there can be more than one cause of disability. The question is whether the accident related injuries play a material role in the cause of the Applicant’s disability despite other causes (whether those unrelated causes arose before or after the accident). Director’s Delegate Evans found that the concept of “intervening event” stems from the tort doctrine of “original position” which does not apply in SABS cases. Thus, **“**only if his (Mr. Arunasalam’s) disability had lessened to a level that he no longer met the disability test, as in *Worku*, would the accident cease to be a material cause of his disability”. Since his accident related injuries still contributed to his disability, income replacement benefits were payable.

This is a very useful case for rebutting any insurer presumptions of intervening event in an accident benefits claim.

***CHRONIC PAIN AND DISABILITY***

Many healthcare experts take issue with the idea that chronic pain syndrome is disabling. I continue to receive many reports which suggest that in the absence of objective organic pathology, a patient’s chronic pain can not lead to disability.

However, in 2003 the Supreme Court of Canada rendered its decision in Martin v. Worker’s Compensation Board of Nova Scotia*[[3]](#endnote-3)*. In that decision the Supreme Court of Canada unanimously stated as follows:

There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite the lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.

The Supreme Court of Canada went on to state as follows:

Finally, the medical experts recognized that chronic pain syndrome is partially psychologically in nature resulting as it does from many factors both physical and mental. This Court has consistently recognized that persons with mental disabilities have suffered considerable historical disadvantage and stereotypes. …

Although medical evidence before us does point to early intervention and return to work as the most promising treatment for chronic pain, it also recognizes that in many cases, even this approach will fail. It is an unfortunate reality that, despite the best available treatment, chronic pain frequently evolves into a permanent and debilitating condition.”

Supreme Court of Canada jurisprudence is applicable to accident benefits cases. In fact, in Shubrook and Lombard General Insurance Company of Canada*[[4]](#endnote-4)*, Arbitrator Kominar reviewed *Martin v. Nova Scotia* and summarized:

The implications of the Supreme Court’s decision is that it is not morally appropriate or legally justifiable to stereotype individuals whose disabilities happen to be “less visible” than others. Even though pain is subjective, not directly perceivable by outside observers, or difficult to verify or quantify, it is nonetheless real. No one in pain doubts this; and at some point in our lives most of us will come to learn this lesson.

Thus, based on Martin v. Worker’s Compensation Board of Nova Scotia*,* it is a breach of the Charter of Rights and Freedoms to discriminate against those with chronic pain syndrome.

***POST-104 WEEK INCOME REPLACEMENT BENEFITS***

Section 5 (2) (b) of the SABS provides that an insurer is not required to pay income replacement benefits (IRBs) for any period longer than 104 weeks of disability unless, as a result of the motor vehicle accident, the insured person is suffering a complete inability to engage in any employment for which that person is reasonably suited by education, training or experience (hereinafter the complete inability test).

Lombardi and State Farm Mutual Auto Insurance Company[[5]](#endnote-5) was the first decision that attempted to define the parameters of this test. In this case, Arbitrator Sampliner found that the complete inability test did not require a degree of impairment that was as high as “catastrophic impairment” (used to determine entitlement to enhanced medical, rehabilitation and attendant care benefits) nor as low as the “substantial inability” test (used to determine entitlement for the first 104 weeks of disability). Although this decision was a useful first step in defining the complete inability test, it still left much room for interpretation. Lombardi has recently been overturned on appeal[[6]](#endnote-6) (on other grounds) but the parameters set by Arbitrator Sampliner remain consistent with other Arbitration decisions.

Terry and Wawanesa Insurance Company[[7]](#endnote-7) helped to further define the parameters of the complete inability test. Mr. Terry was involved in a motor vehicle accident on May 22, 1997. For the 13 years prior to the motor vehicle accident, he had worked in the paving business (seasonal work from May to November). Following the accident, Mr. Terry continued to have ongoing neck, upper back, left shoulder and headache pain. The applicant attempted to return to work in a modified job as a taxi dispatcher. Despite Mr. Terry’s honest attempt to return to work, he was unable to achieve more than three hours on the job at any one time, was never able to work more than three days a week, never worked consecutive days and never performed the full duties of a dispatcher.

Following a thorough review of the records, Arbitrator Palmer noted as follows:

“It is not my sense of the test of paragraph 5(2)(b) that the meaning of “complete inability” is that the applicant has to suffer an inability to do more than 50 percent of the job…Real world jobs should not be broken down into their component parts such that if an applicant is able to do a little more than half of any suitable job, that he should be found to be disentitled from receiving income replacement benefits (and an employer should be obliged to hire him for that job). As Arbitrator Sampliner pointed out in *Lombardi*, a literal reading of total disability clauses has been rejected in many previous cases and a literal reading of ‘complete inability’ would mean an insured would have to be unable to perform any function of any job to qualify.

Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity must be addressed.”

As a result, Arbitrator Palmer found that Mr. Terry met the complete inability test, and ongoing IRBs were to be paid post 104 weeks into the future.

As well, in the case of Shubrook and Lombard, Arbitrator Kominar stated:

The Regulation talks about an ability to “engage in employment” not simply to perform discrete job tasks. In my view, to “engage in employment” is to participate actively in the work relationship over some reasonable period of time. In addition, the employee must be able to meet normal employer expectations. This has nothing to do with the issue of workplace accommodations which can often facilitate a disabled person’s return to employment. Rather, I am referring to basic, common sense expectations, such as, that an employee will reliably show up for and remain at work, as well as be able to concentrate and focus sufficiently on the tasks at hand to do his or her work with some acceptable level of competence. No reasonable employer would expect anything less and no employee should expect to do any less.

Mr. Shubrook was also awarded ongoing income replacement benefits.

Jim Horne and CIBC[[8]](#endnote-8) is a recent decision attempting to define what should constitute “suitable employment” within the context of the complete inability test. Prior to the accident, Mr. Horne had been working for 25 years as a welder making approximately $40,000 per year. Mr. Horne was 47 years old at the time of the accident and had a Grade 9 education. Following the motor vehicle accident, Mr. Horne returned to full-time work as a car jockey and even worked over-time making approximately $22,000 per year. In this decision, Arbitrator Anne Sone examined how “suitable employment” should be defined within the context of the complete inability test. Arbitrator Sone found that the question of identifying suitable employment should be analyzed as follows:

1. The question of suitable employment in every case is a question of fact: the work must be suitable to the applicant, viewed fairly and realistically in the context of his or her educational and employment background.

1. Suitable work is not limited to what the applicant was doing at the time of the accident, provided that it is not unrelated to his or her previous experience. However, work is not necessarily suitable because an applicant has done a stint of it in the past. If the job is substantially different in nature, status, or remuneration it may not be an appropriate alternative.
2. In deciding suitable employment, one must consider such factors as the nature and status of the work compared with what the applicant did before, the hours of work and level of remuneration, the applicant’s employment experience and length of time spent in different jobs, his or her age, and his or her qualifications and technical training and know-how.

1. The primary focus is on an applicant’s functional limitations; however job market considerations are relevant in determining suitable employment.

Arbitrator Sone also determined that an alternative job would not be considered “suitable” if the injured person required further training to qualify for the position.

Based on an analysis of these factors, Arbitrator Sone found that Mr. Horne was completely disabled from any suitable employment.

The monetary discrepancy between the pre-accident and post-accident employment (or potential employment) will weigh most heavily in determining whether suitable employment has been found. If the post-accident job leads to a reduction in earnings of greater than 20%, counsel has a reasonable chance of proving that the job does not qualify as suitable employment.

In addition, an alternative job is not likely to be suitable if the injured person is unable to work the number of hours they performed prior to the accident.

The analysis in Horne and CIBC has been borrowed from case law under the OMPP which determined entitlement to weekly benefits for any period greater than three years post accident (S.12 (5) (b) of the SABS, OMPP).[[9]](#endnote-9)

In Burtch v. Aviva*[[10]](#endnote-10)* the trial judge found as a fact that the plaintiff was capable of light to medium physical work despite his ongoing chronic pain and mood disorder. Vocational experts had identified that long haul truck driving may be an alternative employment. This was an employment with a reasonably comparable salary to the plaintiff’s pre-accident work. However, because the plaintiff did not have the money to fund the necessary educational component to obtain his license, the trial judge found that this was not an available occupation for the plaintiff. However, the Ontario Court of Appeal rejected the trial judges final conclusion stating:

It is not necessary that the insured person be formally qualified and able to begin work immediately in order for a particular employment to be considered a reasonably suitable alternative. A job for which the insured is not already qualified, may be a suitable alternative if substantial upgrading or retraining is not required.

Burtch v. Aviva represents an important limitation to any argument about what’s suitable employment. However, The Court of Appeal specifically made mention that Aviva’s denial of the vocational program was not before the Court. Where an insurers has denied both income replacement and vocational treatment these issues must be litigated together.

L.F. and State Farm Mutual Insurance Company[[11]](#endnote-11), a recent decision of Arbitrator Blackman, describes what evidence is required to meet the complete inability test. Firstly, Arbitrator Blackman found that the SABS does not require the applicant to prove a negative; that is, the legislation does not require proof that there is not a job that the insured can do. Rather, the applicant might discharge their onus of proof by exploring career options or by identifying some sort of suitable employment and then describing the physical demands of that employment and demonstrating with credible evidence why the applicant could not engage in such employment. This system of proof was first used in a series of cases under the OMPP. However, unlike the OMPP legislation, we now have the disability DAC system. Thus Arbitrator Blackman went on to state:

“I find that an applicant may meet his or her onus of identifying suitable employment by opting for a DAC assessment. This meets the intent of this system being accessible, expert, less expensive and quicker. I find that L.F., by opting for a DAC assessment has met his onus of identifying or trying to find potentially suitable employment.”

In the case of L.F., the DAC found that the applicant did not satisfy the complete inability test. However, Arbitrator Blackman found that the DAC should not require the applicant to prove to the assessors that he or she suffers a complete inability to perform suitable employment. The DAC assessors should have acted as experts, not adjudicators. Rather, it was the assessor's job to accurately determine the applicant’s level of disability. If the assessor could not determine the level of disability, they should not put the onus back on the applicant and deny his or her entitlement. Based on this analysis, Arbitrator Blackman found that L.F. was entitled to IRBs pursuant to S. 5 (2) (B).

The decision in L.F. is also important for the analysis of the entitlement to attendant care, housekeeping and home maintenance benefits. This case is presently under appeal and it is likely to be some time before the final outcome is determined.

L.F. does not identify the only important evidence necessary to prove whether an applicant has met the complete inability test. In each case, counsel must look closely at the injured person’s pre-accident history to determine whether suitable employment has been identified. It is important to collect strong evidence from fellow employees, employers and supervisors regarding the injured person’s work ethic and job satisfaction before the accident. It would also be helpful to determine if the injured person had good attendance records prior to the accident.

Often times the most challenging scenario occurs where the injured person never attempts to return to work of any kind after the accident. This can make it more difficult to show that the injured person is lacking tolerance for competitive employment. In this instance, I would recommend a thorough vocational assessment conducted by a reputable facility. Alternatively, counsel should obtain a report from an occupational therapist with a strong background in vocational rehabilitation. All of this information could be helpful for the assessors and any adjudicator.

***NON-EARNER BENEFITS***

Section 12 of the SABS defines entitlement to non-earner benefits. Those who don’t qualify for IRBs or caregiver benefits may seek non-earner benefits. Individuals who, for example, were unemployed or students before their accident may seek non-earner benefits. However, for the first 26 weeks following the accident, these benefits are not payable. Thereafter, the benefits are only payable if the injured person continues to suffer a complete inability to carry on a normal life. Recently, some very important decisions have interpreted this section.

The first case of note is Walker v. Wawanesa Insurance Company[[12]](#endnote-12). This is the decision of Mr. Justice Brokinshire delivered January 3, 2003. The decision covers various issues related to the SABS, including non-earner benefits. Stephanie Walker, the injured person, was 17 years old at the time of her motor vehicle accident. Prior to the accident, Stephanie had been most interested in soccer, socializing and studying (which was a distant third on the priority list). As a result of the motor vehicle accident, Stephanie suffered a serious brain injury. Following the accident, Stephanie went on to Seneca College to complete a course as a library technician. With substantial scholastic assistance, Stephanie was passing her courses and living in residence at Seneca College in Toronto, Ontario.

Mr. Justice Brokinshire reviewed past jurisprudence regarding entitlement to non-earner benefits. Most of these cases analyzed entitlement by comparing a “shopping list” of the plaintiff’s activities performed before and after the accident. Justice Brokinshire dismissed this form of analysis. To emphasize this point, His Honour stated: “[Before the accident] I cannot see her [Stephanie] as listing the pouring of orange juice and making of toast in the morning as something she would regard as the ‘activities’ of her life”.

Rather His Honour determined that a “purposive approach” should be taken to characterizing the injured person’s pre-accident activities. Using this approach, His Honour determined that Stephanie engaged in three major activities before the accident: soccer, socializing and studying. Based on the evidence, His Honour found:

“Simplistically, when I see her [Stephanie] as being completely prevented post accident from engaging in the two most important activities of her life (soccer and socializing) and only marginally able to engage in the third (school), I conclude that she has been prevented from engaging in substantially all of the activities in which she ordinarily engaged. “

This case represents a significant break from previous decisions. Had Mr. Justice Brokinshire used the “shopping list” analysis it is unlikely that Stephanie would have qualified for non-earner benefits.

Maria Daponte and The Motor Vehicle Accident Claims Fund[[13]](#endnote-13) is the most recent case to expand entitlement to non-earner benefits. Prior to the accident, Mrs. Daponte was responsible for her own home maintenance. Mrs. Daponte suffered a compound comminuted fracture of the right leg in a pedestrian motor vehicle accident. Mrs. Daponte was left with pain and reduced range of motion in the right ankle and was only able to do light household activities. The facts revealed a serious issue with respect to causation. In fact, in the months prior to the accident, Mrs. Daponte had been to her rheumatalogist because she could not negotiate stairs and complained of pain in the back, neck, shoulder and thigh. Arbitrator Janice Sandomirsky found that following the motor vehicle accident the injured person must be able to engage in their pre-accident activities in a competent manner. In fact, Arbitrator Sandomirsky went on to state:

“The activity must be viewed as a whole and should not be broken down into its constituent parts. An applicant who is merely ‘going through the motions’ cannot be said to be ‘engaging in’ an activity.

In cases where pain is the primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequently, is such that the individual is practically prevented from engaging in those activities.”

Based on this analysis, Arbitrator Sandomirsky determined that Mrs. Daponte was entitled to non-earner benefits.

In my view, these two decisions have the potential to expand the number of claims for non-earner benefits.

In order for the injured person to be successful in obtaining non-earner benefits, counsel should always consider two issues. Firstly, when being retained following a motor vehicle accident, counsel should have a well-qualified occupational therapist assess the injured person’s abilities. This will provide a good base line to compare the injured person’s pre-accident and post-accident level of activities.

Secondly, counsel should identify good lay witnesses. It is extremely valuable to have a witness who can describe the injured person’s pre-accident and post-accident activity levels in a down to earth and straightforward manner. Most of these individuals will be family members. However, if these lay witnesses are counseled to give balanced, honest and straightforward evidence, they have the potential to bolster the case of the injured person. I would also suggest trying to find non-family members - teacher, clergy, someone who worked out at the same gym, etc. who can provide relatively independent evidence.

***CONCLUSION***

The above noted jurisprudence has helped to define the parameters of the complete inability test. Most of the case law protects the insured person’s right to accident benefits.

However, asking doctors to include this jurisprudence in their analysis has proven very difficult. It is hoped that continued discussion will allow for greater consistency among the medical and legal communities.

V:\Allen Papers\20110527 Complete Inability Test Paper.doc

1. Trial Decision: [2005] O.J. No. 2526; Appeal Decision: 90 O.R. (3d) 689 [↑](#endnote-ref-1)
2. [1996] 3 S.C.R. 458 [↑](#endnote-ref-2)
3. [2003] 2 S.C.R. 585 [↑](#endnote-ref-3)
4. A01-000010, October 11, 2001 [↑](#endnote-ref-4)
5. FSCO P01-00022 [↑](#endnote-ref-5)
6. FSCO P01-00022 [↑](#endnote-ref-6)
7. FSCO A00-000017 [↑](#endnote-ref-7)
8. FSCO A00-000291 [↑](#endnote-ref-8)
9. For example look at Riley and Pilot A-007940, Spicer and State Farm A-010158 and Wigle and Royal A-012312. [↑](#endnote-ref-9)
10. 2009 ONCA 479 (CanLII) [↑](#endnote-ref-10)
11. FSCO A00-000364 [↑](#endnote-ref-11)
12. [2003] O.J. No. 18 [↑](#endnote-ref-12)
13. FSCO A01-000486 [↑](#endnote-ref-13)