This paper provides an update of case law with respect to the complete inability test under Bill 59. As of the writing of this paper, the Province is preparing to implement important amendments to the Statutory Accident Benefits Schedule (hereinafter the SABS). These amendments will change certain procedural steps in the management of accident benefits cases. In addition, effective January 1, 2004, income replacement benefits will be reduced to a maximum of $300.00 per week instead of $400.00. However, the complete inability test has not been altered. Thus, the case law to be discussed in this paper will still be relevant under the new SABS. Specifically, this paper will review jurisprudence on the complete inability test relevant to post-104 week income replacement benefits and non-earner disability benefits.

General Rules of Interpretation

Upon first reading the complete inability test seems to be an insurmountable burden. However, it is always important to remember some general rules of interpretation. When analyzing this test, always look at Section 10 of the *Interpretation Act*[1] which states:

> "s. 10 Every Act shall be deemed to be remedial, whether its immediate purport is to direct

> the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act according to its true intent, meaning and spirit."

In addition, case law has clearly indicated that the *Insurance Act* and the SABS are intended to protect the insured. In fact, in Coombe v. Constitution Insurance Company[2] Madam Justice Wilson (as she then was) speaking on behalf of the Court of Appeal stated:

> "…The legislation was designed for the protection of the insured and should be construed in the way most favourable to him"

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[3] 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[4] (on other grounds) but the parameters set by Arbitrator Sampliner remain consistent with other Arbitration decisions.

Terry and Wawanesa Insurance Company[5] 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.

This decision helped clarify the parameters of the complete inability test under Section 5(2)(b).

Jim Horne and CIBC[6] 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.

2. 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.

3. 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.
>
> 4. 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). In the future, counsel would be well advised to analyze this older jurisprudence in order to determine whether it might assist in their present cases dealing with the complete inability test under Bill 59.[7]

L.F. and State Farm Mutual Insurance Company[8], 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 DAC 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[9]. 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.

This case is now under appeal but no timetable has been set for oral arguments.

Maria Daponte and The Motor Vehicle Accident Claims Fund[10] 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. Both defence and plaintiff counsel would be wise to review these decisions carefully in order to appreciate their significance.

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.

In the very near future we will be faced with a new set of rules under Bill 198. The purpose of this new Bill is to curtail the cost of

insurance to consumers throughout the Province of Ontario. It is uncertain whether this new Bill will have the desired effect. What is clear is that plaintiff counsel must continue to advocate strongly to protect the rights of injured persons. Previous jurisprudence under Bill 59 will continue to help counsel define the parameters of this new legislation.

ENDNOTES

[1] Interpretation Act

[2] Coombe v. Constitution Insurance Company, [1980] I.L.R. 4878

[3] FSCO A99-000957

[4] FSCO P01-00022

[5] FSCO A00-000017

[6] FSCO A00-000291

[7] For example look at Riley and Pilot A-007940, Spicer and State Farm A-010158 and Wigle and Royal A-012312.

[8] FSCO A00-000364

[9] [2003] O.J. No. 18

[10] FSCO A01-000486