

Understanding Non-Earner Benefits

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Non-Earner Benefits (“NEBs”) have been available to injured claimants through the *Statutory Accident Benefits Schedule*² since the overhaul of Ontario’s no-fault automobile insurance system in 1990. NEBs serve as a means to compensate individuals for their loss of enjoyment of daily life by providing monetary support for their inability to engage in activities ordinarily performed prior to a motor vehicle accident.³ In theory, the provision of this benefit was one of the trade offs for the reduction of the right to sue in tort caused by the introduction of a threshold for pain and suffering damages and to provide some form of weekly compensation to those not attached to the workforce akin to the income replacement benefit.

NEBs arguably have the most stringent threshold within the *Schedule* and there has been a great deal of debate on how to assess NEB applications. This paper will focus on the fundamental concepts concerning the test for entitlement to NEBs and provide some guiding principles with regard to its application.

Defining Non-Earner Benefits under the *Schedule*

NEBs are one of three weekly benefits available for supporting daily life necessities. The three weekly benefits are: 1) Income Replacement Benefits (“IRBs”) to compensate insured persons for lost income; 2) Caregiver Benefits (“CGBs”) to compensate expenses incurred when an insured person is substantially unable to perform his or her duties as a primary caregiver for a dependant; and 3) NEBs to compensate insured persons who are completely unable to carry on a normal life and not receiving either aforementioned benefits. With the September 1, 2010 changes to the *Schedule*, CGBs are no longer available to non-catastrophic claims, which has led to a gradual increase in the number of NEB claims being made. Therefore, a comprehensive understanding of the test for NEB entitlement is imperative for managing claims.

Eligibility

Pursuant to the *Schedule*, an insured must suffer a complete inability to carry on a normal life as a result of and within 104 weeks after the subject accident to be eligible for NEBs.⁴ In addition, one of three qualifications must be met: 1) the insured does not qualify for IRBs; 2) the insured received CGBs as a result

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² *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O Reg 34/10, s 12 [*Schedule*].

³ *Walker v Ritchie* (2005), 25 CCLI (5th) 93, CanLII 13776 at para 84, (Ont CA).

⁴ *Schedule*, *supra* note 2 at s 12.

of the accident but no longer has a person in need of care; or 3) the insured was enrolled in full-time education or completed the education within one year prior to the accident, and was in an employment that reflected his or her training or education before the accident.⁵

Section 3(7) of the *Schedule* interprets “a complete inability to carry on a normal life” to mean a person who suffers from an impairment as a result of the accident that continuously prevents him or her “from engaging in substantially all the activities in which the person ordinarily engaged in before the accident.”⁶ The amount of the NEB is \$185 per week for as long as the insured is eligible to receive the benefit.⁷ Only those claimants who meet the education test stipulated in section 12(1)(3) with more than 104 weeks having passed since the onset of the disability will qualify for a benefit increase of \$320 per week.⁸ Contrary to some perceptions, the potential benefit increase to \$340 a week at the 104 week mark is not available to everyone who qualifies for an NEB for that duration. The increase is only available to those individuals who, at the time of the accident, were enrolled in a full time elementary, secondary or post secondary education at the time of the accident or who had completed their education less than one year before the accident and was neither employed nor self employed after completing their education in a capacity that reflected his or her education or training.⁹

Age Considerations

NEBs are not payable to a claimant under 16 years old.¹⁰

For claimants over 65 years old, as at the date of the accident NEBs are payable for a maximum of 4 years on a reducing basis: the weekly benefit is paid in full for the first year, then reduced to 80% the second year, 60% the third year and 30% for the fourth and final year.¹¹

If, however, someone qualifies for NEBs before age 65, the benefit is then converted at age 65 to a lifetime pension at a reduced rate, the sum of which is 2% multiplied by the number of years of entitlement (to a maximum of 35 years or 70%) multiplied by the weekly benefit received before age 65.¹² Thus, someone who qualifies at age 60 and who will continue to qualify permanently thereafter, will have their \$185 weekly benefit converted to a pension at age 65 of 10%, or \$18.50 a week for the remainder of their life.

⁵ *Ibid.*

⁶ *Ibid* at s 3(7).

⁷ *Ibid* at s 12(2).

⁸ *Ibid* at s12(3).

⁹ *Ibid* at s 12(3) and 12(1)2.

¹⁰ *Ibid* at s 12(4)(b).

¹¹ *Ibid* at s 9(1).

¹² *Ibid* at s 8(1).

Deductions

There is no option to purchase additional coverage to increase the limits for NEBs. Further, insurers are not required to pay NEBs for the first 26 weeks after the onset of a complete inability to carry on a normal life.¹³ Pursuant to section 47, NEBs can be reduced by collateral benefits received by the insured who is under any temporary disability benefit or any other periodic benefit paid under an income continuation plan or under the law.¹⁴ However, it is arguable that NEBs cannot be reduced by any income earned by the injured person for those rare instances where a claimant can earn money and still meet the “complete inability” test.

The “Complete Inability” Test and Causation

Section 3(1) of the *Schedule* defines impairment as “a loss or abnormality of a psychological, physiological or anatomical structure or function.”¹⁵ Under section 3(7)(a), a person suffers a complete inability to carry on a normal life as a result of an accident “if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.”¹⁶ In assessing a claimant’s pre and post-accident activities of daily living, it is imperative to understand that *substantially* all does not mean *all* activities.¹⁷

NEB applications are frequently very challenging to assess. Often they are being advanced by claimants who were not working or taking care of children at the time of the subject accident. This may be due to significant pre-existing health problems. Thus, it is often challenged to discern what activities were being done before the accident so as to know whether substantially all have been affected. With regard to accident benefits, it is critical to evaluate to what extent the motor vehicle accident has impacted the claimant’s pre-accident lifestyle by way of assessments. This determines what the likely source of the debilitating injuries is, i.e. the causation.

Causation involves the causal relationship between a conduct or occurrence and the result. In the realm of accident benefits, causation is established by applying the “material contribution” test.¹⁸ In determining the pre and post-accident activities of a NEB claimant, the “material contribution” test asks whether the accident

¹³ *Ibid* at s 12(7)(a).

¹⁴ *Ibid* at s 47.

¹⁵ *Ibid* at s 3(1).

¹⁶ *Ibid* at s 3(7)(a).

¹⁷ *Galdamez v Allstate Insurance Company of Canada*, 2012 ONCA 508, 111 OR (3d) 321 at para 39 [*Galdamez*].

¹⁸ See *Monks v ING Insurance Company of Canada*, 2008 ONCA 269, 90 OR (3d) 689 [*Monks*], where the Court acknowledged the distinction between tort and accident benefit cases and found that in the latter, the material contribution test ought to be used.

marginally or significantly contributed to the claimant's impairment. The threshold for this test is less onerous than the standard "but for"¹⁹ test applied in tort law because the claimant is not required to prove the accident was the direct cause of the impairment. Effectively, any contribution that is noted to exceed a *de minimus* standard will be said to be a material contribution. For NEBs, the claimant need only show the accident contributed to his or her complete inability to carry on a normal life. As established in *Athey*, "The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm."²⁰

In order to determine whether the claimant is unable to carry on a normal life, what constitutes a "normal life" to the claimant must first be established. This is entirely contextual and will vary on a case by case basis. For example, if prior to the accident, the claimant spent all of his or her time at home lying in bed on account of a disability, then to what extent would the alleged injury from the subject accident impact the claimant's life after the fact? Ultimately, a comparison must be drawn between the claimant's activities and life circumstances before the accident to those afterward. This assessment must be viewed with a mind to causation and whether the subject accident has contributed in any material way to the disability, whether or not the disability was the result of a pre-existing condition.

Common Law Interpretation of the Test

The test for NEBs was first set out in the 1996 *Schedule* as requiring a person to suffer a complete inability to carry on a normal life within two years of the subject accident. The test for entitlement to NEBs has been frequently recognized as a strict one.²¹ Meeting the test requires "a significant degree of impairment and a marked, measurable impact on the levels of function and consequent ability of the insured person to continue in their pre-accident activities."²² On that basis, being unable to perform a few pre-accident activities would not amount to a substantial inability, regardless of the significance the activities may have had in the individual's life.²³ Since the 2010 *Schedule* changes, the courts have seen an increase in the number of cases

¹⁹ In contrast, the "but for" test asks whether there is any other cause for the injuries that led to the claimant's complete inability to carry on a normal life. If there is no other cause, then the disability would not have occurred but for the motor vehicle accident and causation is met.

²⁰ *Athey v Leonati*, [1996] 3 SCR 458, SCJ No 102 at para 19 [*Athey*]. This case is recognized for the Court's enunciation on the principles governing causation in tort law, and was heavily relied on in *Monks* concerning the issue on causation.

²¹ See e.g. *Buccellato v Allstate Insurance Co of Canada* (14 April 2004), FSCO A03B 000609; *Cook v Pilot Insurance Co* (9 May 2005), FSCO A03B 001085, online: FSCO <<http://www.fSCO.gov.on.ca>> [*Cook*].

²² *Buccellato*, *supra* note 21.

²³ *Ibid.*

dealing with NEBs. The leading principles today are largely informed by the Court of Appeal decisions in *Heath v Economical Mutual Insurance Company*²⁴ and *Galdamez v Allstate*.²⁵

In *Heath*, Economical appealed the trial judge's order requiring it to pay its insured NEBs as a result of injuries sustained in a motor vehicle accident. The Court of Appeal held that the trial judge had erred in applying the test for NEBs. The trial judge's finding of a *partial* inability was insufficient to satisfy the strict NEB test and the Court of Appeal set aside the order and dismissed the action as against Economical.

Under *Heath*, the Court of Appeal found that to determine a complete inability, an analysis must be made with regard to the activities the claimant was ordinarily engaged in prior to the accident *in actuality*, and not whether the individual suffers a complete inability to engage in the activities they would normally engage in. The Court of Appeal developed the following step-by-step guideline in applying the "proper approach" to the NEB test:

1. Analyze whether the claimant suffers from a complete inability to carry on a normal life by comparing his or her activities of daily living before the accident to those after the accident.
2. Consider the claimant's activities of daily life for a reasonable period preceding the accident, and not just a "snap-shot" of a particular good or bad time. The duration of a reasonable period will turn on the facts.
3. Consider *all* pre-accident activities ordinarily engaged in by the claimant. Greater weight *may* be given to those activities which the claimant identifies as being important to his or her pre-accident life to satisfy the threshold.
4. The claimant must establish that as a result of the accident, he or she is *continuously prevented* from engaging in substantially all pre-accident activities. A continuous, uninterrupted disability or incapacity must be proven by the claimant. It is insufficient if the claimant is only sometimes or occasionally prevented.
5. A qualitative perspective is required to determine whether the claimant is "engaging in the activity." Isolated post-accident attempts to perform activities that the claimant was able to perform pre-accident is insufficient. It is possible for a person to be capable of performing some of an activity but not enough to make it meaningful. If there are significant restrictions when performing an activity, this will not amount to "engaging in" that activity.

²⁴ 2009 ONCA 391, 95 OR (3d) 785 [*Heath*].

²⁵ *Galdamez*, *supra* note 17.

6. Finally, where pain is the primary factor preventing a claimant from engaging in former activities, it must be shown that the degree of pain experienced prevents the claimant from engaging in those activities. The test is not whether the claimant can physically do them.²⁶

In *Heath*, the Court of Appeal determined that while an impairment must be severe for a claimant to qualify for NEBs, a person's individual story and circumstances are vitally important and will be considered.²⁷ Therefore, while the test for proving an entitlement to NEBs is statutorily an onerous one, meeting the threshold of a complete inability to carry on a normal life may not be as stringent in application, depending on the circumstances. A claimant is not required to prove that he or she is completely incapable of doing anything. Rather, the test can be satisfied if there is an impairment from performing a significant amount of quality activities performed prior to the accident. Further, based on the qualitative analysis purported by the Court, if an insured's ability to perform an activity is severely restricted or takes an excessive amount of time, that may amount to being prevented from engaging in an activity. This contextual approach endorsed in *Heath* was furthered in the Court of Appeal's recent *Galdamez* decision, where it found that a claimant may earn money pre and post-accident and still qualify for NEBs, which in effect widened the door to NEB entitlement.

In *Galdamez*, the insured was informed that she was not eligible for IRBs because the Employer Confirmation of Income Form indicated she had only missed one day of work as a result of the accident.²⁸ The insurer further noted that because Ms. Galdamez had elected IRBs, she was not entitled to NEBs. On a summary judgement motion, the judge dismissed the action against Allstate Insurance because the claimant was employed at the time of the accident and therefore could not qualify for NEBs regardless of whether or not she met the disability threshold. The Court of Appeal disagreed, holding that a clear, plain reading of the *Schedule* provides that a claimant's status as an employed person does not, in and of itself, establish an ineligibility for NEBs.²⁹ Employment status is only one part of the test for IRB entitlement. The second part requires the claimant to demonstrate that he or she meets the threshold for a substantial inability to perform the essential employment tasks. For example, "in jobs where mobility is not a requirement (e.g., department store greeter, telemarketer, etc.) and the job [is] not of great importance in the claimant's pre-accident life, it may be possible for a claimant who returns to his or her pre-accident employment following an accident to satisfy the test for non-earner benefits."³⁰

²⁶ *Heath*, *supra* note 24 at para 50.

²⁷ *Heath*, *supra* note 24 at para 51.

²⁸ Under section 5(2)(a) of the 1996 *Schedule*, no benefit is payable for the first week of disability.

²⁹ *Galdamez*, *supra* note 17 at para 29.

³⁰ *Galdamez*, *supra* note 17 at para 44.

In essence, one could still be ineligible for IRBs despite fulfilling one part of the test and therefore NEBs cannot be denied on the basis of meeting one requirement alone. Being denied one benefit does not preclude an insured from entitlement to another.

The principles from *Heath* and *Galdamez* were most recently applied in *Willoughby v Dominion of Canada*.³¹ In this decision, the judge dismissed a motion for summary judgement on the grounds that he did not have the necessary evidence to determine whether the insured was entitled to NEBs. Citing *Heath*, Justice Broad reaffirmed the need to use a qualitative approach in assessing NEB entitlement by viewing the relevant activities as a whole in light of the manner and quality in which they are performed post-accident.³² Whether a claimant is practically prevented from engaging in those activities must be determined by the degree of pain experienced subsequent to the activity and not whether he or she can physically do them. Without this information, Justice Broad determined that Dominion had failed to equip him with the necessary evidence to make an appropriate finding of fact. It was further noted that in keeping with *Galdamez*, Dominion had not relied on the fact that the claimant had been working at the time of the accident and had previously advanced an IRB claim.³³ It is clear from this decision that producing sufficient evidence with regard to a claimant's abilities will require comprehensive evaluations of his or her activities of daily living, which may or may not be adequately gleaned from a discovery transcript.

Lessons Learned

Ultimately, a thorough understanding and application of the NEB test remains critical in challenging the veracity of NEB claims. While *Galdamez* has opened the door on accessibility to NEBs, it will likely be an exceptional set of circumstances where a claimant is both capable of returning to employment yet also disabled enough to qualify for NEBs, the test for which remains stringent in theory. NEBs are not intended to compensate an insured for having to engage in his or her post-accident activities with pain and discomfort unless the pain becomes "continuously disabling in its own right."³⁴ Yet, assessors cannot be fooled into thinking that because a clearly disabled individual is taken to work everyday in a sheltered and protected environment effectively to get them out of the house, that they are necessarily ineligible for the benefit. In sum, a thorough analysis of the claimant's pre-accident life must be properly assessed in comparison to his or her post-accident life in order to determine the cause and degree of the claimant's injuries.

³¹ 2014 ONSC 1136.

³² *Ibid* at para 29.

³³ *Ibid* at para 19.

³⁴ *Cook, supra* note 21.