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Deduction of Collateral Benefits: Matching "Apples to Apples" (Tort)

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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** me and I will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Introduction

The question as to what a tort defendant is entitled to deduct in terms of a plaintiff's entitlement to accident benefits is one of the most important aspects of any assessment of a case. Specifically, is a tort defendant entitled to deduct past and future income replacement benefits as well as medical benefits paid to a claimant by way of an accident benefits release? The law has been in flux with regards to same with the pendulum of the decisions swinging between for and against the claimant. The recent decisions in 2015-2016 have seen the pendulum come to a rest in support of the insurers; with the intention of preventing double recovery by a plaintiff.

"Apples to Apples" Deductions: The Updated Law

Much of the discussion of what a defendant is entitled to deduct revolves around the concept of matching "apples to apples". Some courts found that a defendant is only entitled to deduct past income replacement benefits from past income loss and future income replacement benefits from future income loss claims. Since the typical settlement disclosure notice in an accident benefits claim lumps past and future income replacement benefits together, the Courts had found that it is difficult to determine what deductions are allowed. For this reason, courts had often found that a defendant is not entitled to a deduction at all, or a limited

one at best (ie past income replacement benefits). By way of an analogy, the Court was not prepared to deduct Macintosh apples (ie past income loss) from Granny Smith apples (ie: future income loss). This resulted in a body of case law that favoured the plaintiff and thereby allowed double recovery in many cases.

The Divisional Court in the case of *Mikolic v. Tanguay* (2015)

addressed this issue head-on both in terms of a claimant's receipt of income replacement benefits and health care benefits at trial. In that case the claimant settled his accident benefits case for $77,500 for past / future income replacement benefits and $37,500 for past / future medical benefits. The Jury awarded to the claimant $50,000 in past / future income loss and $15,000 in health care expenses. If the defendant was entitled to deduct the full amounts paid as set-out in the settlement disclosure notice than the claimant's entitlement would be nil for these heads of damages.

The Divisional Court found that section 267.8(1) does not differentiate between deductions to be made from tort awards for income loss in respect of accident benefits received for past income replacement benefits and for future income replacement benefits. The Court found that since the award is globally one for income loss, it is from this award the deduction must be made. Essentially, one does not have to differentiate between MacIntosh apples and Granny Smith apples; one simply deducts any apple from any apple. Accordingly, the defendant was able to deduct all past and future income replacement benefits as identified on the settlement disclosure notice from the entire jury award of income loss. This resulted in an income loss award of nil.

Similarly, the Jury in *Mikolic* awarded to the claimant $15,000 for future care costs in relation to his claim for a pain management program and the settlement disclosure notice earmarked $37,500 for all past and future medical benefits. Based on the same reasoning as set-out above, the Divisional Court applied section 267.8 (4) of the *Insurance Act* to find that the defendant is entitled to deduct the accident benefit settlement from the Jury award. Again, this resulted in the plaintiff receiving nil for health care expenses at trial.

What is particularly interesting about this aspect of the decision is that it does not seem to be relevant to the type of past or future health care expense that is in issue. It appears that any award of a health care expense that is potentially covered by an accident benefits release is subject to a deduction. Presumably if the health care expense is not claimable in accident benefits than it would not be deductible. However, there are not very many health care expenses not potentially claimable in an accident benefits claim and it would likely be difficult for a Plaintiff to make the case for an exception.

In the recent decision of *Fonciciello* v. Bendall (2016) the Court applied and followed the reasoning in *Mikolic*. The Judge stated as follows:

> "At this point in the evolution of this issue, I am bound by the Divisional Court decision in *Mikolic*. Accordingly, I accept that I should not differentiate between a past loss of income claim and a future income loss claim for the purpose of applying s 267.8(1) of the *Insurance Act*."

The recent Court of Appeal decision of *Basandra v. Sforza* (2016) supports the principle behind Section 267.8 of the *Insurance Act* to "prevent double recovery by the plaintiff, which would amount to unjust enrichment". In that case, the jury questions were quite general as they lumped together past / future medical benefits, attendant care, and housekeeping. This caused a problem in terms of parceling out what is deductible from the settlement of the accident benefits claim. The Court of Appeal upheld the trial judge's decision to deduct from the Jury award all of the accident benefits as set-out in the settlement disclosure notice.

The confusion revolved around matching-up the Jury award to the settlement disclosure notice as this could easily have resulted in the Trial Judge finding that there is no matching between "apples to apples". For example, one should not be able to deduct a housekeeping benefit from a medical benefit as this would be comparing oranges to apples. The trial Judge utilized her discretion and matched-up the specific award to the settlement disclosure notice which resulted in the claimant's entitlement to be nil for these heads of damages. The Court of Appeal approved of the trial judge's approach to the question of deducting benefits as they found as follows:

> "She reasonably gave effect to one policy objective in the statutory scheme – full compensation – while respecting another policy objective – no overcompensation. The trial judge reasonably apprehended that if she did not make the reductions sought by the defence, the appellant would have been overcompensated."

Conclusion

These recent decisions by all levels of Court in Ontario support the concept that any listing of income replacement benefits, attendant care benefits, and medical benefits are deductible from a Jury award; regardless whether this is a past or future benefit. This is different from the past case

law in which specific benefits had to be matched-up to one another such as past IRBs to past income loss. It remains to be seen how the Courts will now address settlements of accident benefits claims not subject to a settlement disclosure notice and lump sum settlement of long term disability benefits claims. However, if the concept of preventing double recovery is now the focal point of the Courts then insurers have a greater chance of affecting the deduction. This new case law should be utilized by insurers to affect more reasonable settlements and to argue post trial regarding the reduction of any Jury Awards.

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The Beard Winter Defender
Past Issues

The Upcoming Dramatic Impact Of The LAT On Accident Benefits, "The Times They Are A Changing"

Amid controversy and much consternation among the personal injury bar, the Licensing Appeals Tribunal (LAT) is coming into effect on April 1, 2016. It is clear from a review of the procedures and practices in place that the upcoming changes will be significant from an insurer standpoint.

The Minor Injury Guideline: The Law Now And Into The Future

The enactment of the Minor Injury Guideline ("MIG") in the current legislation is perhaps the most substantive change that we have been dealing with on a day-to-day basis. If a claimant falls within the MIG then the claimant is only entitled to a maximum of $3,500 in medical benefits as opposed to $50,000.

Who Has Priority To Pay In The Rental Vehicle Case?

When defending an insurer in a motor vehicle case involving a rental vehicle some sound investigation may result in significant savings. Knowledge of the law pertaining to rental vehicles is essential to the proper adjusting of such claims; and may result in a reduction or even the elimination of exposure.

Everything An Accident Benefits Adjuster Needs To Know About A Tort Claim But Were Afraid To Ask

There are fundamental differences in the adjusting for an accident benefits claim compared to that of a bodily injury claim.

What You Need To Know About An Incurred Expense

One of the most significant changes to the *Schedule* post September 1, 2010 revolves around the question as to what constitutes an incurred expense. Gone are the days in which a family member / friend would be compensated for providing attendant care assistance to a claimant for love. Now they must show they did it for money.