



BEARDWINTER LLP

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What I Need To Know About ODSP

It is important for claimant counsel to understand the intricacies of ODSP in order that he is able to maximize a beneficial recovery for his client. There is a real risk that if claimant counsel focuses on just the damages claim to the exclusion of ODSP considerations, that he is doing a real disservice to his client. As a Defendant, (tort or accident benefits), it is key to understand the inter-play between ODSP and personal injury compensation when negotiating a settlement. In the end, it may result in the defendant saving money.

Background

The Ontario Disability Support Program (ODSP) is a social services program that provides financial assistance to people with disabilities who are over the age of 18. In order to qualify for this program, a person must satisfy a two part test: (1) medical eligibility and (2) financial threshold provisions.

As a Defendant we want to obtain the complete ODSP file in order to determine in what manner the claimant qualified for this benefit (and what was submitted). If the claimant's focal point for claiming ODSP is something other than her injuries sustained in the motor vehicle accident, then this will certainly be useful information to the defence.

From a financial threshold, a claimant may be eligible for ODSP if she owns less or equal to \$5,000.00 worth of assets (if married then \$7,500.00), and an additional \$500.00 worth of assets for each dependant. Some other general accepted assets to which the claimant may own and still be found entitled to ODSP include:

a home, a motor vehicle of any value, tools of the trade for one's employment, and a life insurance policy.

ODSP and Personal Injury Settlements / Awards

In addition to the above exempt assets to which a claimant may own, pivotal to our purposes is the personal injuries damages exemption. As set-out in subsection 28(1)(2), a claimant is entitled to maintain her ODSP while as at the same time receive compensation for personal injuries up to a maximum amount of \$100,000 for:

- i. pain and suffering as a result of injury to or the death of a member of the benefit unit, (this would include damages pursuant to the *Family Law Act*) or
- ii. expenses actually and reasonably incurred or to be incurred as a result of injury to or the death of a member of the benefit unit.

A claimant can exceed the \$100,000 limit only upon receipt of approval from the Director of ODSP if this amount is used, (or will be used), for disability related expenses. For instance, if the claimant is able to establish that she will use the funds into the future for treatment she may get approval from the Director to receive more than \$100,000. This additional exemption can be used as a mechanism to enter into a structured settlement for an amount in excess of \$100,000; while as still maintaining monthly ODSP payments.



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There is a catch however. The claimant must obtain the Director's approval and there is an annual reporting requirement. In seeking approval for the expanded exemption, often future care cost reports are submitted which may not exactly reflect the claimant's actual interests in using the money. Whereas the future care cost report will set-out the amount of physiotherapy a claimant will need for the rest of her lifetime; she may have no actual interest in attending for such treatment once she settles her case. If a claimant cannot prove to the Director that she is meeting the plan set-out, it is possible the sum in excess of \$100,000 may be clawed-back by ODSP; and her entitlement terminated.

In terms of the \$100,000 exemption, it is important to be aware that this sum may not include any economic loss. This includes past income loss, future income loss, income replacement benefits, and non-earner benefits. Accordingly, if a claimant settles a case for \$50,000 in general damages and \$50,000 in income loss; then the claimant is obligated to pay back to ODSP the entire \$50,000 economic loss component (up to the amount received to date from ODSP).

As per ODSP Policy Directive 5.1, for some reason ODSP does not consider medical benefits, housekeeping, attendant care, or caregiving benefits to be an economic loss. Accordingly, a claimant is not obligated to pay back any of this sum provided that the total amount received is \$100,000 or less. As such, if a claimant settles a case for \$50,000 in general damages, \$25,000 in housekeeping, and \$25,000 in medical benefits she gets to keep the entire \$100,000 sum; and continue to receive ODSP.

The \$100,000 sum is inclusive of PJI but exclusive of legal fees, disbursements, and taxes. If the claimant receives a settlement by way of a lump sum award, ODSP will allow the legal fees, disbursement, and taxes to be paid out from the gross award.

Insurer Not Entitled To Deduct ODSP From Economic Loss Claim

Neither a tort defendant, nor an accident benefits carrier, is able to deduct payments received by the claimant post accident for ODSP. The decision of *Moss v. Hutchinson* (2007) stands for the proposition that a defendant is not able to reduce a claimant's award by the value of the ODSP that she has received. Since the claimant is required to repay to the government the amount that she received in ODSP for economic loss, an insurer cannot deduct this sum for payment of any income loss.

Litigation Strategies

If a claimant is 30 years old and receiving ODSP I expect that she would be loath to give this benefit up. She may be willing to settle for something less than the actual value of her case in order to maintain her ODSP entitlement. When we are dealing with a case worth \$500,000 then this likely will not be a consideration. But, when

dealing with a case worth between \$105,000 to \$200,000 it might. Creative strategies could be employed to frame a settlement in such a way that the defendant is perhaps paying less than the value of the case and the claimant is satisfied with same. For instance, a settlement may be framed as being entirely for general damage, or a combination of generals, housekeeping with medical benefits to a maximum of \$100,000. This way there is no obligation to repay anything to ODSP.

Similarly, legal costs, disbursements, and taxes are statutory exemptions. As per the minutes of settlement, the parties may specify that the damages portion is \$100,000 and set-out a figure for fees, disbursements, and taxes. In the appropriate case, a structured settlement may be suggested for any amount in excess of \$100,000 as a means of satisfying the interests of the parties.

Many claimant counsel do not have an appropriate understanding of the rules pertaining to ODSP and may act to the detriment of their client. I would not assume that all claimant lawyers have thought through the implications of settling their client's cases for an economic loss and / or for a sum in excess of \$100,000. I expect that there are also some claimant counsel who have found loopholes in the system.

As a defence lawyer, I have been retained to represent the interests of my insurer clients. The best way for me to do this is to try and understand the motivating factors of a claimant; and use that knowledge to my advantage. Understanding the inter-relationship between ODSP and personal injury compensation is one means of achieving that goal.

Notes:

Ontario Disability Support Program Act S.O. 1997 c. 25. Schedule B Preserving Ontario Disability Support Program and Housing Benefits After Settlement – the Answer is NOT Henson Trust, by Nimali D. Gamage

ODSP Disputes At The Conclusion Of Catastrophic Claims by Rhona L. Waxman Law Offices

Moss v. Hutchinson (2007)

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