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What A Tort Defendant Can Deduct From An Accident Benefits Settlement, Future Accident Benefits Entitlement, and Disability Benefits Settlement: “Apples from Apples”



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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 us and we will certainly explore the possibility of writing an article.

The principle of the rule against double recovery is legally sound. A claimant is not supposed to be able to recover compensation for the same loss more than once. For this reason a tort defendant is entitled to deduct income replacement benefits received by a claimant when making a payment for income loss. Otherwise, a claimant will be earning more money not working than when he did while at work. However, the law pertaining to deductions is far from straightforward. While as the Courts want to prevent double recovery, they also want to prevent double deductions. The Court is concerned that a claimant not be undercompensated by allowing a tort defendant to deduct benefits to which the claimant may not have received. The recent case law has made it difficult for a tort defendant to deduct accident benefits settlements, future entitlement to accident benefits, and disability benefits settlements.

Deduction of Accident Benefits Settlements

In *Mikolic v. Tanguay* (2013) a Jury awarded to the Plaintiff Judgment for among other things future income loss and cost of future care. Following the conclusion of trial the defendant brought a motion to deduct from the trial award the accident settlement amounts received by the claimant for future income replacement benefits and future medical benefits. The accident benefits file settled on a full and final basis and set-out in a standard settlement disclosure notice the specific benefits paid under each heading. It was argued by the defendant that the claimant has already been compensated on the accident benefits side for the exact benefit received by the claimant in the trial verdict (see Section 267.8 of the *Insurance Act*). To allow the Plaintiff to receive both the trial award and the accident benefits settlement would be to condone double recovery.

While as it was agreed that the tort defendant is entitled to deduct for the IRBs paid for past loss, the Court ruled that it was not entitled to a credit for future payment of IRBs. The Court reasoned that the accident benefits settlement was by way of a lump sum payment and that it cannot be said that the claimant was actually fully compensated for his future income loss. For this reason, none of the payment of future IRBs was deducted. This is despite the fact that there was a listing for payment of IRBs past and future in the release. The Judge wrote as follows:

“The amount offered and accepted was a lump sum compromise by both parties to resolve the risks and costs of continuing with a law suit. It is therefore not possible for this court to be able to

determine what amount, if any, should be deducted from the damages for future income loss awarded by the jury. I would therefore make no deduction under that head of damage.”

For the same reason the court declined to allow any deductions from the Jury award for cost of future care from any part of the accident benefits settlement. The Jury awarded one sum for cost of future care while as the accident benefits settlement specifically set-out payment of benefits for attendant care and medical benefits. The Court was not satisfied that there was an overlap between what the claimant received from the Jury compared to what he received in his accident benefits settlement. The Judge reasoned as follows:

“Likewise, there is no evidence before me as to what portion of the A.B. settlement of past and future attendant care, medical rehabilitation, or medical benefits are specifically for the future. As well, the jury award does not break down the amount under the three headings in the release signed by the plaintiff regarding the settlement of those A.B. benefits. Under such circumstances it is impossible for this court to know whether it would be deducting apples from apples. I therefore conclude there should be no deduction from the jury’s award under the head of damage for future care costs.”

The governing principle that appears throughout the case law, is that the Court needs to be convinced that it is deducting “apples from apples”. The Court appears to require that it be set out explicitly in both the Jury award and the accident benefits release that the claimant has received compensation twice. Other than awards for past income loss and perhaps past housekeeping, this appears to be very difficult to establish.

Deducting Future Accident Benefits Entitlements

In *Hoang v. Vicentini* (2013) a trial proceeded in which the Plaintiff received a lump sum award of future health care costs. In that case, the accident benefits claim was still open and the claimant was receiving payment of medical benefits on an ongoing basis. The defendant sought an order pursuant to section 267.8(12) of the *Insurance Act* for an assignment of future collateral benefits. The defendant was seeking to be indemnified by the accident benefits carrier for the ongoing payment of medical / attendant care / housekeeping benefits paid to the claimant on account of the Jury award.

The Judge ruled against awarding this assignment. The Judge found that:

“[A] deduction from a Plaintiff’s damage award to prevent against double recovery will only be made if it is absolutely clear that the Plaintiff’s entitlement to the future accident benefits is certain and the Plaintiff received compensation for the same benefits in the tort judgment...the jurisprudence supports the view that where the concept of entitlement to future long-term insurance benefits is used as a basis for reducing the plaintiff[’s] damage recovery it must be strictly interpreted to require that it be beyond dispute that the plaintiff qualifies for these future payments in every respect.”

The court was concerned that since the issue of payment of future medical benefits is uncertain it would be unfair to the Plaintiff to deduct this amount from a damages award. The Court found that it must be “patently clear” that the Plaintiff qualifies for the future benefits and not merely that there is a likelihood that they will be received on an ongoing basis. The Court found that the factual scenario in this case made it uncertain whether the claimant would continue to recover benefits into the future and that he would receive full compensation for his damages. It is unclear in what factual scenario that it would be “patently clear” that the claimant would receive future medical benefits that would satisfy this test.

Similar to the *Mikolic* decision above, the Court also found that it is not clear from the Jury answer what amount is to be deducted from what category of accident benefits. The lump sum jury award comprised five categories including: medical treatment, rehabilitation, attendant care, housekeeping, and home maintenance. It is not clear what amount is to be allocated to the individual categories. The case law states that in order for a deduction to be made, the amount must be deducted from the same type of expense. The principles of deducting “apples from apples” could not be accomplished in this case and therefore no deduction was allowed. The decision of *Gilbert v. South* (2014) has applied and followed the same reasoning.

The onus of proof to establish the entitlement to future payments of benefits rests with the Defendant. The Court dealt with the onus on a defendant seeking a deduction of future benefits in *Cowles v. Balac* (2005) where it is noted that: “The standard of proof a defendant is required to

meet to establish entitlement to a no fault benefits is very strict. It must be shown to be beyond dispute that the plaintiff qualifies for those payments in every respect”.

Deducting Disability Benefits Settlements

In *Cromwell v. Liberty Mutual Insurance Co.* (2008), the claimant settled with her disability benefits carrier for a lump sum payment of LTD benefits. The accident benefits defendant sought an order entitling it for a deduction of all benefits paid from its responsibility to pay for income replacement benefits. As part of the claim for LTD benefits the Plaintiff sought compensation for mental distress, punitive damages, and costs. In that case, evidence was introduced to show how much of the settlement was payment of past LTD benefits (\$15,000) but the defendant was not able to prove how much the remainder of the settlement (\$160,000) was strictly for future LTD benefits (as opposed to punitive damages, emotional distress, and costs). Accordingly, the accident benefits carrier was found not entitled to deduct any of this aspect of the award. While as this was a motion brought by the accident benefits carrier, the exact same principles would apply in a tort case.

In *Vanderkop v. Personal Insurance Co. of Canada*,(2008) the Court goes one step further and does not allow a deduction for any of the LTD settlement. The Judge found that the funds represent a lump sum payment arrived at after a lawsuit was commenced and negotiated as a compromise. There is no allocation of the lump sum settlement as among the various heads of damage claimed. The defendant is not entitled to any deduction for a payment in respect of the lump sum settlement payment made by Manulife.

These two decisions have been cited in *Mikolic* recently to stand for the proposition that:

“Lump sum awards to settle law suits regarding future I.R.B.’s or other wage continuation plans have been held not to be deductible because such payments are a compromise made to settle a legal obligation one party sought to enforce by litigation against another and therefore fall outside the scope of s. 267.8(1)2. They cannot be considered weekly payments for loss of income in the future but rather a lump sum negotiated as a compromise to resolve the risks to both parties of the law suit”.

It is certainly common practice now that the claimants

are settling LTD claims by way of a lump sum basis and refusing to allow any deduction to the accident benefits carrier or tort defendant for any income loss.

Conclusion

The law pertaining to what a tort defendant is entitled to deduct is probably one of the most important things we need to know as part of our jobs. We need to know what an accident benefits carrier and disability benefits insurer have paid to a claimant; and whether we are entitled to a credit for same. Equally important, it is necessary for us to assess our files properly to determine what our exposure is on the basis of what we cannot deduct. While as we know that there is a law against double recovery we also must be aware that it is very difficult for us to prove that this has happened. The recent case law supports the proposition that any uncertainty as to whether the claimant has been properly compensated as opposed to overly compensated is to be found in the favour of the claimant. While as adjusters / counsel should employ a vigorous defence to advance our interests we should always keep in mind the law of deductions. Despite how hard we may try, you cannot squeeze apple juice out of a lemon.

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The Beard Winter Defender Past Issues

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The New Summary Judgment Rules and Insurance Law: A New Weapon in the Arsenal of Litigation (tort and accident benefits)

As an insurer, there is perhaps nothing more frustrating than getting dragged into years of litigation when there is no legal exposure.

What is an Economic Loss? The Appeal Courts Have Spoken

Slowly but surely the changes to the Statutory Accident Benefits Schedule are being interpreted by the Courts and Arbitrators. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means.

The Law of Damages In Motor Vehicle Accident Cases (Tort): 101

The law with respect to the burden of proof in motor vehicle accident cases is often overlooked until it is too late. We need to know what we need to prove when assessing cases, advancing a position at a mediation, and well before we step inside a courtroom.

Need To Know: Four Recent And Key Accident Benefits Decisions

Knowledge of the law is important for both adjusting claims and negotiating settlements. This is all the more pronounced in the realm of accident benefits where the new changes to the Schedule have resulted in a host of unanswered questions.

Facebook and Insurance Litigation

The advent of the popular social phenomenon Facebook and other social media sites has given the insurer a new tool to take a peek into the private life of a claimant.

Non-Earner Benefits: What You Need To Know

Claims for non-earner benefit are often very difficult to assess. Since these claims are being advanced by people who are not working or taking care of children.

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