



BEARDWINTER LLP

# Defender

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## Economics 101 (Updated): What Can You Deduct (Income Loss)?

The key point of contention in most personal injury cases often comes down to the assessment of the income loss claim. One integral component of that assessment is: what can an insurer deduct when dealing with a claim for income loss? No insurer wants to allow the claimant to affect a double recovery, and no claimant's counsel wants his client to be under-compensated. Accordingly, understanding the basics that deal with income loss claims is vitally important to insuring that you have arrived at a good settlement.

### Past Income Loss and Future Income Loss Calculations

For tort and accident benefits claims for accidents arising before September 1, 2010 the calculation of past income loss is 80% of net up until trial. In tort claims, future income loss commences from the date of trial and changes to 100% of gross income. For income replacement benefits claims it remains 80% of net.

On the tort side, it is important to note that the past income loss claim ends at the date of trial. During settlement discussions often claimant's counsel will calculate past income loss up until the time of the negotiations / mediation; and future income loss thereafter. This is wrong and will result in the insurer overpaying if this premise is accepted. Remember, an 80% of net figure will often work out to about 60 - 70% of gross. If you estimate that the trial will take place

1-2 years down the road from the date of your negotiations, then that will result in a considerable savings compared to using a future income loss calculation of 100% of gross.

For accidents occurred from September 1, 2010 onwards the calculation of income loss has changed. Now, the income loss calculation for both income replacement benefits and past income loss claim on tort side is 70% of gross as opposed to 80% of net. In most cases, 70% of gross income will work out to more than 80% of net income. It will never be less. This will result in higher calculations of the claimant's past income loss claims. On the accident benefits side we will see more weekly IRB entitlements closer to the high end of \$400.00 and on the tort side we will see more shortfall past income loss claims.

### Income Replacement Benefits

A tort defendant is able to deduct the claimant's entitlement to income replacement benefits. The accident benefits carrier is obligated to pay a maximum of \$400.00 weekly in IRBs provided that the claimant meets the test for disability. Often the claimant's calculation of 80% of net income will be less than the \$400.00 weekly income replacement benefit paid by the accident benefits carrier; which might mean that the tort defendant has no exposure to past income loss.

It is important for a tort defendant to be aware how an income



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Your comments are appreciated and if there are any commercial or insurance related 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. Contact: [defender@beardwinter.com](mailto:defender@beardwinter.com)

replacement benefit is calculated when assessing a past income loss claim. By statute, an accident benefits carrier is obligated to calculate the claimant's benefit on the basis of the last four weeks of work or the average of the last 52 weeks; whichever is greater. The claimant's historical work history is irrelevant in the accident benefits world. So, if a claimant did not work for 10 years before the accident and then four weeks before the collision she starts working at a temporary job earning \$500.00 weekly, then the accident benefits carrier is obligated to pay an IRB. A tort defendant is entitled to argue that the claimant does not have a strong work history and the job was just temporary. There is no statutory obligation to accept that the accident benefits carrier's quantification of IRB represents the claimant's true past income loss claim. Using the claimant's vocational history is just one effective means of reducing an income loss claim.

## Disability Benefits

Both a tort defendant and accident benefits carrier are able to deduct any payments received by, or are available to, a claimant for long term disability benefits and short term disability benefits. The law is clear that if a claimant simply applies for benefits and these are denied, that the claimant is not obligated to take any further action. He is not required to sue for these benefits. On the other hand, if a claimant fails to apply for an income continuation benefits plan that he is eligible to receive, then it may be argued that these benefits ought to be deemed received and the full deduction taken.

The essential question in these disability plans is whether it is an "income continuation benefits plan". There are some benefits plans which simply make a lump sum payment / alternative payment to the claimant upon suffering from a disability. A careful review of the wording of the policy ought to take place as to whether this payment is compatible to an "income continuation benefit plan". If it does not fall within this categorization as per the case law, then it is not deductible.

The decision of *Cromwell v. Liberty* (2008) is a unique case in which the Court has allowed the claimant to effect a double recovery much to the chagrin of accident benefits and tort insurers. In that case the claimant commenced a lawsuit against his LTD carrier for payment of disability benefits, mental distress, and punitive damages. He ultimately settled the case for payment of past arrears and future benefits by way of a lump sum payment; which is not uncommon. In the accident benefits claim that proceeded subsequently, the insurer sought to deduct the amount received by the claimant in his settlement of the LTD claim. The Court found that the amount earmarked for past LTD benefits was easily discernable and should be deducted (about \$15,000.00), but that

the future amount could not (about \$160,000.00). The Court found it could not clearly separate how much of that \$160,000.00 was for future LTD benefits, mental distress, punitive damages, and any other non-pecuniary amount. Although in practical terms virtually all of the \$160,000.00 would be for future LTD benefits, the Court found that none of this was deductible. Insurers should be wary of this decision as it encourages claimants to settle their LTD claims for lump sum payments and then seek double recovery from the accident benefits and tort defendants.

In the past, there was an exception to deducting for collateral benefits plans for private insurance plans. In both the tort realm (*Cugliari v. White* [1998]) and accident benefits world (*Codling-Mokoena v. CAA Insurance* [2006]), a private insurance plan was determined not to constitute "an income continuation benefit plan" and was non-deductible. This was not considered to be double recovery as an individual was entitled to purchase non-indemnity insurance policies in order to cushion for losses in the event of an adverse event. Changes to the *Insurance Act* [ie. Section 267.(1)(c)] and the Schedule suggest that this "private insurance" exception is no longer applicable. The question comes down to whether it is an "income continuation benefits plan" or not.

## CPP Disability Benefits

Prior to January 1, 2002, Canada Pension Plan ("CPP") disability benefits were not deductible from payment of income replacement benefits. Up until October 1, 2003 there was a live question as to whether or not CPP disability benefits were deductible on the tort side on account of conflicting decisions (see *Meloche v. McKenzie* [2005]) which indicated that CPP benefits were deductible). In any event, subsequent to October 1, 2003, (Bill 198), it is clear that CPP disability benefits are deductible on the tort side and subsequent to January 1, 2002 they are deductible on the accident benefits side.

When negotiating a settlement one should keep in mind the claimant's status vis-à-vis CPP disability benefits. Remember, if a claimant settles with the accident benefits carrier/tort defendant, and then receives CPP disability thereafter, he does not have to repay to CPP any of the money he received by way of the settlement. He gets to keep both. When negotiating a settlement it is sometimes a good tactic to argue for a deduction of past and future CPP benefits in light of the anticipation that the claimant will be found entitled to CPP disability benefits after you settle. Also, if a claimant is ultimately found entitled to CPP disability benefits he is entitled to such benefits on a retroactive basis for a maximum of 11 months. For 2011, the maximum entitlement to CPP disability benefits is \$1,153.37 monthly.



## Sick Days

The question of deductibility of sick day benefits is less clear on both the tort and accident benefits side. On the tort side section 267.8(1)(3) makes it clear that all payments received by a Plaintiff under a sick leave plan by reason of a plaintiff's occupation is deductible. However, sick days may often be accumulated on an ongoing basis, and if not used, may be cashed in upon retirement. In the alternative, a claimant may argue that by using these sick days on account of the accident that he has used-up a valuable commodity that he may have used for a disability in the future. He may argue that there is a value to this lost commodity. The Courts have yet to conclusively determine whether either of these two ways of quantifying a value towards a sick day is proper or not in a motor vehicle accident case.

On the accident benefits side, an accident benefits carrier may not deduct payments under a sick leave plan that are not being received by the person, but are available to the person (*Howden v. Pafco Insurance Company* [2001]). This is an important distinction as it states that a claimant is not required to even apply for sick leave benefits. If a claimant elects to receive income replacement benefits as opposed to using up her sick benefits then there is nothing that the accident benefits carrier can do about it. This statutory language is very different from the requirements set-out above for short term and long term disability benefits.

## ODSP, EI, and WSIB

Neither the tort defendant, nor the accident benefits carrier, is able to deduct payments received by the claimant post accident for Ontario Disability Support Program ("ODSP") or Employment Insurance benefits ("EI"). Interestingly, I have not been able to find one decision in the accident benefits realm that specifically addresses ODSP. In the tort world, the decision of *Moss v. Hutchinson* (2007) stands for the proposition that a tort defendant is not able to reduce a claimant's award by the value of the ODSP that he has received because these monies are collected by the Plaintiff on behalf of ODSP. Essentially, the claimant is required to repay to the government the amount that he received in ODSP and therefore there is no double recovery. My expectation is that a Court will come to the same conclusion regarding the non-deductibility of ODSP for accident benefits as well.

In *Mihelic v. Cineplex* (1997) the Court came to the same rationale as to why a tort defendant may not deduct employment insurance benefits received post accident. Section 7(2)(a) specifically states that an accident benefits carrier may not deduct employment insurance benefits that are being received by or are available to the person.

Similarly, the *Insurance Act* (Section 267.8(15)) and the Schedule state that neither the tort defendant, nor the accident benefits carrier is able to deduct for WSIB benefits received by the claimant post accident for an unrelated incident. If the claimant was a Schedule 1 employee who was involved in an accident involving another Schedule 1 employee, then he may be prohibited from commencing a tort and accident benefits claim altogether. This is the best deduction of all!

## Severance Packages

The question of whether a tort defendant and accident benefits insurer is able to deduct the amount received by the claimant by way of a severance package requires a little leg-work. In *Skinner v. Goulet* (1999) the claimant received a severance package from his pre-accident employer and the tort defendant sought to have the entirety of the monies received deducted from payment of income loss. The Court stated that it is the Defendant's responsibility to prove its entitlement to the deduction and that they were obligated to determine which part of the settlement was considered to be payment of income (as opposed to other possible heads of damages). The Defendant was unable to do so and the Court therefore concluded that the defendant was not entitled to deduct any of the severance package. The same rationale would apply to an accident benefits claim. Accordingly, it is essential to (1) require that the claimant provide a breakdown as to the settlement amount and/or (2) to attempt to determine yourself what portion of the settlement would reasonably be considered income and the time frame to which it has been paid.

## Pensions

Neither a tort defendant, nor an accident benefits insurer is able to deduct for any pensions received by a claimant either from an employer or the Canada Pension Plan.

## Caregiving and Non-Earner Benefits

A tort defendant, is not able to deduct non-earner benefits received by the claimant from his accident benefits carrier (*Walker v. Ritchie* [2005]) from either income loss or general damages.

If a claimant applies for caregiving benefits on the accident benefits side, (as opposed to income replacement benefits), the tort defendant is not entitled to deduct what his income replacement entitlement would have been. At one juncture it was successfully argued by the tort insurer that if a claimant failed to apply for income replacement benefits on the accident benefits side, (on account of the fact that he applied for caregiving benefits instead), that the tort defendant should not be forced to pay for the entire past income



loss claim. The Court of Appeal in *Sutherland v. Singh* (2011) found that if a claimant applies for caregiving benefits on the accident benefits side, and at the same time she applies for an income loss claim on the tort side, she is entitled to both without any deductions.

## Post Accident Income

In both tort and accident benefits, a defendant/insurer is able to deduct 80% of net post accident income from 80% of pre-accident income in order to calculate any shortfall in past income loss. This is based on the principle of comparing “apples to apples”. However, in tort claims you will often find that defendants are deducting 100% of gross post-accident earnings without any objection from plaintiff counsel. If you are able to finesse such a deal on the tort side, then consider that found money.

In the accident benefits world, the deduction of post-accident income is on the basis of the claimant’s IRB sum and not 80% of net (*Longo v. Lombard* [2007]). For instance, if the claimant was working full time at the time of the accident and his earnings were an 80% of net sum of \$600.00 weekly then his entitlement to IRBs would be the maximum payable of \$400.00 weekly. If the claimant subsequently found a part-time job earning an 80% of net sum of \$300.00 weekly, then the insurer’s obligation is to now pay just \$100.00 weekly. Longo tells us that we deduct the post accident earnings (\$300.00) from the claimant’s IRB sum (\$400.00) and not his 80% of net figure (\$600.00). Before Longo many insurers would have deducted the \$300.00 post accident income from the \$600.00 pre-accident income leaving an entitlement to the claimant of \$300.00 weekly in IRBs. Indeed, this is the way the deductions are still made with respect to the receipt of collateral benefits.

In the tort context, the insurer is only entitled to deduct 80% of net post accident income from 80% of net pre-accident income. So, in the above scenario the tort insurer would be obligated to pay to the claimant the shortfall of \$300.00 weekly (before deducting for the IRBs of \$100.00 weekly).

## Conclusion

Calculating a claimant’s quantification of income loss is one of the most difficult aspects of insurance law. It requires a technical knowledge of the different headings of benefits and why one is different from the other. Many counsel will just assume that E.I. benefits are deductible, past income loss calculations are calculated as of the date of a mediation, that the private insurance disability plan exclusion is still the law, and that severance packages always are not deductible. This would all be wrong. We need to question if a claimant has applied for disability benefits, what is the status of CPP disability benefits, and what is going on with the settlement of an LTD claim. All of these factors effect the calculation of the income loss claim, and perhaps provides us ammunition to negotiate a good

resolution. The basics of what an insurer can deduct for income loss is not so basic. At the end of the day we want to avoid double recovery at all costs. If along the way we successfully argue for an additional deduction that we perhaps were not entitled too; then kudos to you for reading this article.

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