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Economics 101: What Can You Deduct (Income Loss and Income Replacement Benefits)?

My draft title for this article was: "Everything You Wanted To Know About Deductions But Were Afraid To Ask". Upon working on the article, however, it quickly became apparent that: (1) I did not know everything and (2) that this topic is quite large and somewhat complicated. Instead, I have chosen to focus on what deductions are available to a tort defendant and accident benefits carrier with respect to a T4 employee for past income loss. Since payment of income loss is typically one of the key issues in a dispute with a claimant, it is pivotal that a tort defendant and accident benefits carrier know what they can and cannot deduct.

Disability Benefits and CPP

Firstly, both a tort defendant and accident benefits carrier are able to deduct any payment 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. 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.

A significant exception to deducting for collateral benefits plans, however, deals with 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. It is imperative to carefully review the disability benefits policy to assess whether it is truly a private disability insurance plan.

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.

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



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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 recent 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!

Deductions for Severance Packages and Post Accident Income

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.

Finally, it is clear that a tort defendant and accident benefits carrier can deduct post-accident income earned by the claimant. A tort defendant, however, 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. 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.

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.

A recent decision in the accident benefits realm (*Longo v. Lombard* [2007]), is essential reading for both accident benefits and tort adjusters in relation to how one deducts post-accident earnings. Presently, most insurers are deducting 80% of net post accident income from 80% of net pre-accident income. So, if a claimant was earning \$600.00 (80% of net pre-accident) and he returned to



work at part of his pre-accident job responsibilities and was earning \$400.00 (80% of net post accident) the differential would be \$200.00. Most accident benefits insurers in these circumstances re-calculate the claimant's entitlement to accident benefits to be \$200.00. The claimant would be fully compensated to 80% of net by the accident benefits carrier. Although the maximum payable for IRBs is \$400.00, the deductions are based on the 80% of net pre-accident figure (in this case \$600.00). The aforementioned situation is not uncommon where a claimant had two jobs pre-accident and only felt capable of returning to one of the jobs post accident.

In *Longo*, the Arbitrator concluded that this past practice is incorrect. She found that the insured's post accident income ought to be deducted from the amount "payable" to the claimant; that being \$400.00. As such, if the claimant was receiving post-accident income in the amount of \$400.00 (80% of net) then that ought to be deducted from the amount that he was receiving from his accident benefits carrier; \$400.00. This would leave the claimant with an entitlement of nil for income replacement benefits but still \$200.00 weekly short in relation to his past income loss claim. The net effect of this is that the accident benefits carrier has nullified its exposure and the tort defendant is now the target for the past income loss. This decision adds a new wrinkle between the interplay of tort and accident benefits.

Conclusion

In conclusion, it is my practice to assess my files based on the true exposure, and then try to feel out plaintiff counsel and co-defence counsel as to whether they appreciate what I can and cannot deduct. It is only my obligation to educate my adversaries when it is to my advantage. If Plaintiff counsel will allow me to deduct for employment insurance benefits received by the claimant post loss; then who I am to stop them. Income loss calculations can be tricky. Having a strong background as to what you can and cannot deduct is important and will allow you to achieve better resolutions as compared to an ill-informed Plaintiff counsel or co-Defendant.

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