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Defender

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Court of Appeal Decision affirms Non-Earner Benefits are deductible from loss of income awards

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Summary

In *Kolapully v Myles*, 2024 ONCA 350 ("**Kolapully**") the Court of Appeal ruled Non-Earner Benefits ("**NEBs**") under the *Statutory Accident Benefits Schedule* ("**SABS**") are deductible from damages for past income loss.

Background

The Plaintiff was struck by a TTC bus while crossing at the intersection of Ellesmere Road and Nielson Road in Scarborough on March 6, 2012. The Plaintiff commenced a civil action in the Superior Court of Justice on December 3, 2013 for general and specific damages, claiming that she suffered serious and permanent physical and psychological impairment. In January 2018, the Plaintiff brought an Application before the License Appeal Tribunal ("**LAT**"). The LAT ruled the Applicant was catastrophically impaired according to *SABS*. The Respondent, the Toronto Transit Commission ("**TTC**") applied for reconsideration but was denied. Finally, on March 9, 2018, the Plaintiff applied for arbitration at the Financial Services Commission of Ontario. Arbitrator Barrington found the Plaintiff was entitled to NEBs under *SABS*.

Trial decision

In 2022, after a six-week jury trial, the jury awarded the Plaintiff \$175,000.00 in non-pecuniary damages and \$200,000.00 in damages for past loss of income. The jury apportioned the degree of negligence at twenty-five percent (25%) to the Plaintiff and seventy-five percent (75%) to the Defendants.

Before trial, the Plaintiff received more than \$95,000.00 in NEBs as the result of the arbitration proceedings before the Financial Services Commission. Section 267.8 of the *Insurance Act* mandates that, in an action for loss or damage from bodily injury in an automobile accident, the trial judge must reduce the amount of statutory accident benefits received by the Plaintiff from the pecuniary damages award. At trial, the TTC brought a motion to have the Plaintiff's NEBs deducted from the \$200,000 damages award for past income loss that she received at trial.

The trial judge dismissed the TTC's motion. Relying on the Court of Appeal's decision in *Walker v. Ritchie*, 2005 CanLII 13776 (ON CA), 197 O.A.C. 81 (C.A.) ("**Walker**"), the trial judge found that NEBs were not related to loss of income, and are therefore not deductible from a tort award for

loss of income under s. 267.8(1). The TTC argued that this conclusion conflicted with the Ontario Court of Appeal's decision in *Cadieux v. Cloutier*, 2018 ONCA 903, 143 O.R. (3d) 545 ("**Cadieux**"), which lists NEBs in the category of "income replacement benefits." If the trial judge had given effect to this inclusion in *Cadieux*, the NEBs would have been deducted from the jury award for past income loss. However, because *Cadieux* was not a case about accounting for NEBs, the trial judge found that the court's inclusion of these benefits in the category of income replacement benefits was *obiter* and not binding.

The Appeal

The TTC appealed to the Ontario Court of Appeal. The trial judge's decision was overturned. The Court of Appeal held that NEBs were and are deductible.

The Ontario Court of Appeal affirmed that while the statutory scheme aims to compensate injuries parties for injuries suffered in motor vehicle accident, it also aims to prevent double compensation.

In reviewing the historical development of section 267.8 of the *Insurance Act*, the Ontario Court of Appeal adopted the "silo" approach employed in

Cadieux. Under the silo approach, all statutory accident benefits falling within the same broad category are deductible from all damages awards in the corresponding broad category. In doing so, the Court affirmed that the deduction from the tort pecuniary damages award is confined to the apposite silo. If a claimant receives a damage award for future income loss, then the amount the claimant received for income loss under the SABS is deducted from any income loss award.

As a result, the Court ruled that *Cadieux* had overruled *Walker* and was binding on the trial judge. Further, the Court found the Court's treatment of NEBs in *Cadieux* aligned with the intended effect of the legislation and the silos in recapturing SABS. All of the statutory accident benefits are required to be accounted for in those cases in which there is a tort damages award for pecuniary losses. Therefore, the trial judge was required to deduct the amount that the Plaintiff had received for NEBs under the SABS.

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