# ***collateral benefits***

# ***in the ontario motor vehicle accident scheme***

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***INTRODUCTION***

When a person is injured in a motor vehicle accident, there may be four potential claims:

1. CPP disability benefits;
2. Long-term disability benefits;
3. Accident benefits;
4. Law suit against the at-fault party.

The interaction of these claims has always been a vexing challenge. Recent court decisions have added greater uncertainty to the collateral benefits system connecting the different compensation schemes.

***HISTORY***

The traditional common law approach to collateral benefits was to prohibit their deduction. The rule was summarized by the Ontario Court of Appeal in its decision in *Boarelli v. Flannigan[[1]](#footnote-1)*:

... [M]oneys received as a result of a private insurance plan to cover the contingency of an accident have never been set off against the damages which the defendant must otherwise pay. That principle … has never been seriously challenged.

The rationale for this rule was summarized in dicta quoted by the OCA:

If the wrongdoer were entitled to set off what the plaintiff was entitled to recoup or had recouped under his policy, he would in effect be depriving the plaintiff of all benefit from the premiums paid by the latter, and appropriating that benefit to himself.[[2]](#footnote-2)

*Ratych v. Bloomer[[3]](#footnote-3)* sought to further clarify the collateral benefits system at common-law. Since then, the Ontario Provincial Legislature has codified the system for deductibility of collateral benefits within the motor vehicle accident scheme.

Initially, it was thought that long-term disability benefits ought to be deducted from either income replacement benefits (accident benefits) or loss of income damages (in the at-fault party claim). Further it was thought that the entire amount paid for income replacement benefits would also be deducted in any claim against the at-fault party. For many years, practitioners have worked under these assumptions. However, recent challenges to the collateral benefits system have led to a system with much uncertainty.

***THE DEDUCTIBILITY OF LONG-TERM DISABILITY SETTLEMENTS FROM INCOME REPLACEMENT BENEFITS UNDER THE SABS.***

Section 7 (1) of the Statutory Accident Benefits Schedule (pre Sept. 1/10) states as follows:

**Despite subsections 6(1) and (5), but subject to subsection 6(2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:**

1. **The amount determined under subsections 6(1) and (5), reduced by,**
	1. **net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and**
	2. **net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.**
2. **The greater of the following amounts:**
	1. **$400.00.**
	2. **If the optional income replacement benefit referred to in section 27 has been purchased and is applicable to the person, the amount fixed by the optional benefit.**

By virtue of this Section, the legislature has made accident benefit insurers the payor of last resort among first party insurers. For many years it was thought that any benefits paid for past or future long-term disability benefits were a credit to the accident benefit carrier. However, recent case law suggests that settlements of future LTD payments may not be deducted from income replacements benefits.

The starting point in this regard is Justice Lofchik’s decision in *Cromwell v. Liberty Mutual Insurance Co.[[4]](#footnote-4)* In that case, as a result of being injured in a motor vehicle, the plaintiff was entitled to SABs. Liberty Mutual, the plaintiff's accident benefits insurer ultimately provided income replacement benefits. However the plaintiff's claims for certain benefits were denied. In consequence the plaintiff brought suit against Liberty Mutual. In addition, the plaintiff also had long term disability benefits available to her under a policy issued by Sun Life. Those benefits were denied, and the plaintiff then brought suit against Sun Life. Ultimately, the plaintiff settled her claim with Sun Life, for $15,000 for past benefits, and $160,000 for future benefits; and Sun Life received a full and final Release. At the trial of the plaintiff's claim against Liberty Mutual, the latter took the position that it could deduct the $15,000 against past benefits, and the $160,000 against future IRBs. It argued that the $160,000 represented LTD benefits, and as such it constituted income received "under any income continuation benefit plan".

Justice Lofchik rejected this argument. He agreed with Liberty Mutual that the Sun Life policy was an "indemnity policy" and as such (and recalling the distinction recognized in *Cunningham v. Wheele*r[[5]](#footnote-5)), he concluded that the benefits were presumptively deductible. It followed that the $15,000 payment could be deducted because it was clearly an LTD benefit paid in recognition of past income loss. However, the same could not be said of $160,000 lump-sum payment. Upon analysis, Justice Lofchik noted that there was no contractual obligation on Sun Life to make a lump-sum payment in respect of future payments. Nor was the $160,000 specifically designated as being for some particular purpose. Indeed the Release referred generally to the full array of claims against Sun Life. As such, Justice Lofchik rejected the argument that the $160,000 constituted income received "under any income continuation benefit plan". He therefore also rejected Liberty Mutual's contention that the sum was deductible:

... Sun Life was not obliged, under the terms of its policy to pay a lump sum with respect to future payments. There is no evidence before me that the lump sum paid was in any way calculated taking into account the future value of those payments but was rather arrived at on the basis of the amount of money available under the authority of the person authorizing the settlement. I also consider that the Release delivered also released claims against Sun Life with respect to mental stress, aggravated and punitive damages for which Sun Life denied liability in the Release. On that basis, the payment does not qualify as *"net weekly payments for loss of income ... under any income continuation benefit plan"*.[[6]](#footnote-6)

It is worth considering Justice Lofchik's analysis of the $160,000 payment in greater detail. Liberty Mutual had argued that the payment of $160,000 was simply the capitalized value of future benefits payments. Applying the *"surrogatum"* principle outlined by the Supreme Court of Canada in its decision in *Tsiaprailis v. Canada[[7]](#footnote-7)***,** it contended that the payment could be viewed as crystallizing the monthly payments required by the Sun Life policy. As such, the $160,000 could be seen to constitute income received "under any income continuation benefit plan".

However, rather than applying *Tsiaprailis* itself, Justice Lofchik looked to the Supreme Court of Canada's decision in *M.N.R. v. Armstrong[[8]](#footnote-8)*--a decision cited in and approved by *Tsiaprailis.* In *Armstrong* the Court held that a lump sum settlement, paid in full satisfaction of a wife's claim for further payments under a divorce decree, was not made *"*pursuant to*"* that judgment. Rather it was an amount paid "in consequence of" a legal obligation imposed under that judgment.

Justice Lofchik concluded that the foregoing distinction could be applied, by analogy, to the facts in the case before him. Specifically, and having regard to the terms of the LTD policy, he concluded that Sun Life was under no obligation to make a lump sum payment to Mrs. Cromwell. Nor was there any indication in its settlement documentation that the $160,000 was calculated with reference to Sun Life's future obligations. As such he concluded that just as the lump-sum payment in *Armstrong* was not made "pursuant to" a judgment, but simply as a consequence of that judgment, so the lump-sum payment by Sun Life was not made "under any income continuation benefit plan", but simply as a consequence of the legal obligation imposed by that plan.

Finally, Justice Lofchik found additional support for his conclusion in an analysis of the dictionary meaning of the word "under" (as that word is used in the phrase "under any income continuation benefit plan"). Specifically he noted that the *Concise Oxford Dictionary, 10th Edition*, provides that the word *"*under*"* is synonymous with "pursuant to". Strictly speaking the $160,000 payment *was made pursuant to the settlement*; it was not made pursuant to the Sun Life policy. As such it could be concluded that it was not paid "under any income continuation benefit plan".

Within months of the release of the decision in *Cromwell*, Justice Lofchik issued a second decision covering similar territory. In *Vanderkop v. Personal Insurance Co. of Canada,***[[9]](#footnote-9)** the plaintiff had been injured in a motor vehicle accident and was unable to work. She was insured by The Personal under a policy of motor vehicle liability insurance, and also under a group policy of insurance in effect between her employer and the Manufacturers Life Insurance Co. The plaintiff had applied to Manulife for LTD benefits and been denied, after which she sued. Ultimately she settled her claims against Manulife and in return for a release she received a payment of $57,500. Until then, The Personal had been paying IRBs; however, after the settlement with Manulife, The Personal stopped payment.

At trial, the central issue was the deductibility of the payment of $57,500. In a decision affirmed by the Ontario Court of Appeal[[10]](#footnote-10), Justice Lofchik held that the payment was not deductible. In reaching this conclusion he again relied on the *Tsiaprailis* line of authority, but with a slight difference. Although he interpreted the working of s.7(1) of the Schedule (as it then was), Justice Lofchik, did not focus on the question whether the payment constituted income received "under any income continuation benefit plan". Instead he focused on the question whether payment constituted "weekly payments for loss of income". He concluded that it did not. Rather, he held, the payment constituted a negotiated sum intended to compromise a lawsuit. As such he concluded that it did not fall within the scope of s.7(1):

Based on these facts I conclude that the monies paid pursuant to the settlement cannot be characterized as *"net weekly payments for loss of income that is not being received by the person as a result of the accident".* Rather, the funds represent a lump sum payment arrived at after a law suit was commenced and negotiated as a compromise....[[11]](#footnote-11)

Obviously, insurers will have much concern as to whether or not the amendments to Section 7(1) of the SABS (as of September 1, 2010) will have any impact on the interpretation given by the Ontario Courts in the future.

***The Deductibility of Collateral Benefits Settlements from the Tort Award***

Section 267.8(1) of the Insurance Act states:

**In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:**

1. **All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.**
2. **All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.**
3. **All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff’s occupation or employment. 1996, c. 21, s. 29.**

In *Anand v. Belanger* the plaintiff was injured in a motor vehicle accident. The plaintiff eventually commenced three proceedings: the first was an action against the tort defendants and her own insurer, State Farm: the second was a FSCO arbitration involving her accident benefits insurer; and the third was an action against the disability benefits insurer, Manulife. The plaintiff settled her claim for IRBs for $120,000.00, of which she received $80,040 from her lawyer after deductions for legal costs and disbursements. The plaintiff also settled her claim for LTD benefits for $125,000, of which she received $95,000 after the payment of costs and disbursements.

The tort action against State Farm proceeded to trial before a jury. Anand was awarded $85,000 in general damages, $161,679 for past income loss, and $25,000 for future income loss.

The question then arose as to whether State Farm should receive any credits pursuant to s. 267.8(1). First, Justice Stinson considered the deductibility of the $120,000 received for income replacement benefits following settlement of the accident benefits claim. He eventually concluded that only the net amount received by Ms. Anand ($80,040) was actually received and thus, deductible against her tort award. This is an extremely valuable finding for plaintiffs.

The outcome with respect to the settlement reached with Manulife was treated differently. In this circumstance, the plaintiff had executed a general Release in favour of Manulife. Having regard to that Release, Justice Stinson noted that it released Manulife “from… any and all manner of action…claims…with respect to the [LTD policy], including but not limited to non-payment of any disability benefits…” In other words, the Release itself suggested that the payment was not only made to satisfy a specific obligation to provide LTD benefits, but also to compromise any and all legal claims. In addition, and having regard to the language of the LTD policy, Justice Stinson noted that Manulife was under no obligation to provide a lump sum payment. In light of the foregoing Justice Stinson concluded that the payment made by Manulife was not a payment “under an income continuation benefit plan”, and therefore it was not deductible. In reaching his conclusion he relied on *Cromwell*, and on the *Tsiaprailis* line of authority:

I conclude, consistent with the reasoning of Lofchik J. in *Cromwell*, that the payment made by Manulife to settle Mrs. Anand's claim against them was not a payment "under an income continuation benefit plan"; rather, it was a payment to settle a legal obligation that one party sought to enforce by litigation. Therefore it follows that this payment falls outside the scope of s. 267.8(1)2.[[12]](#footnote-12)

The result in *Anand* suggests that in certain circumstances the proceeds of a settlement will not be deductible from a tort award pursuant to s.267.8(1) of the *Insurance Act*. A similar result was reached in *Stokes v. Desjardins Groupe D'Assurances Générales*, although in this case the central focus was not s.267.8(1) but s.267.8(9). The latter requires a plaintiff who suffers injury arising from a motor vehicle accident, and who recovers damages as a result of the trial of an action, to hold the amounts received for statutory accident benefits in trust.

In *Stokes* the applicant had been injured in a motor vehicle accident. He commenced a tort claim against the other driver but settled without going to trial. The settlement reached with the defendant driver's insurer, Desjardins, was for the global sum of $370,000; however, the terms of the settlement did not allocate specific amounts to the particular heads of damages. After settling the tort claim the applicant commenced an action against his own insurer for statutory accident benefits. This action was settled provisionally; it provided that the applicant was required to hold all amounts received in respect of income loss or loss of earning capacity in trust for Desjardin.

The applicant then applied for a declaration that s. 267.8(9) of the *Insurance Act* did not apply to future collateral benefits, at least in this particular case. The applicant argued that by its plain language, s. 267.8(9) only applied to benefits obtained "after the trial of an action". Because the present action had been settled before trial, the section did not apply. Justice Stinson agreed. He held that the Legislature's addition of the qualification "after the trial of an action" imposed a deliberate limitation on the obligation imposed by the statute. Specifically, he held that the Legislature intended that, until trial, the parties should be free to settle claims as they chose, all the while recognizing the possibility of future claims for accident benefits:

...I also infer, that by its failure to include "settlements before trial" in s. 267.8(9), the legislature intended to allow the parties to negotiate settlements, and to agree that claims for damages could be compromised or partially compensated, in circumstances where the parties are aware of the existence of a potential future claim for accident benefits. The parties are given the flexibility to settle both the tort claim and the AB claim or to settle only one of the claims on such terms as they may mutually agree.[[13]](#footnote-13)

### *Conclusion*

Both s.267.8(9) of the *Insurance Act* and s.7(1) of *the Statutory Accident Benefits Schedule* refer to payments "under" an "income continuation plan". The case law considered here suggests that, in certain circumstances, payments made pursuant to the settlement of a claim will not constitute payments "under an income continuation benefit plan"--and as such, they will not be held to be deductible from a plaintiff's award of damages.

The cases further suggest that these "circumstances" include the following:

1. The principle of non-deductibility will only apply to payments received on account of future obligations; it will ordinarily not apply to payments already received.
2. The settlement payment should be received as an undifferentiated lump-sum.
3. Where possible the Release should be general in nature and should not specifically and precisely allocate the settlement funds amongst the various heads of damages.
4. The language of the applicable insurance policy should not contemplate and provide for the satisfaction of the insurer's obligations by way of a lump-sum settlement.
5. The principle of non-deductibility is most easily invoked where the plaintiff enters into settlement with the AB insurer and the LTD insurer, separate from, and prior to the tort insurer.

Attachments

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1. [1973] 3 O.R. 69. [↑](#footnote-ref-1)
2. *Ibid*. at para. 24 [↑](#footnote-ref-2)
3. [1990] 1 S.C.R. 940 [↑](#footnote-ref-3)
4. [2008] O.J. no. 376 (SCJ). [↑](#footnote-ref-4)
5. As will be recalled, in *Cunningham v. Wheele*r, [1994] 1 S.C.R. 359 McLachlin J. (in partial dissent, but not on this point) explained (at para. 12):

	1. The distinction between indemnity and non-indemnity insurance is well-recognized in the insurance industry. The following definitions, which I adopt here, were used by the 1988 Report of Inquiry into Motor Vehicle Accident Compensation in Ontario (the Osborne Commission), at p. 429:An indemnity payment is one which is intended to compensate the insured in whole or in part for a pecuniary loss. . . .  A non-indemnity payment is a payment of a previously determined amount upon proof of a specified event, whether or not there has been pecuniary loss. [↑](#footnote-ref-5)
6. *Ibid*. at para. 40. [↑](#footnote-ref-6)
7. [2005] 1 S.C.R. 113. [↑](#footnote-ref-7)
8. [1956] S.C.R. 446. [↑](#footnote-ref-8)
9. [2008] O.J. No. 1937 (SCJ). [↑](#footnote-ref-9)
10. [2009] O.J. No. 2616 (CA). [↑](#footnote-ref-10)
11. *Ibid*. at para. 81. [↑](#footnote-ref-11)
12. *Ibid*. at para. 26. [↑](#footnote-ref-12)
13. *Ibid*. at para. 21. [↑](#footnote-ref-13)