



Lump Sums and Double Dipping

Is lump sum settlement of long term disability benefits and double dipping under Ontario SABS now acceptable behaviour?

BY JENNIFER M. MALCHUK

Navigating the relationship between collateral benefits, personal injury damages and Statutory Accident Benefit Income Replace Benefits claims in Ontario has become somewhat more complex recently. Two recent Superior Court of Justice cases seem to have changed the landscape of deductibility rules in respect of Income Replacement Benefits and Long Term Disability Benefits, through creative interpretations of lump sum payments.

The Ontario Statutory Accident Benefits Schedule (SABS) governs the deductibility of other payments from Income Replacement Benefits (IRB). Section 7(1) of the SABS states as follows:

“Despite subsections 6(1) and (5), but subject to subsections 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,
 - i. 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
 - ii. 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.”

Crucial to the determination of whether a payment received is deductible from an IRB is the determination of whether or not that payment is an indemnity payment. Although the categorization of payments as either “indemnity” or “non-indemnity” is not the determinative test, the distinction has been noted to be helpful, since the words

“payments for loss of income” carry a notion of indemnification. To avoid double recovery, a person cannot receive both IRBs and their equivalent under some other plan of indemnification. However, non-indemnity payments are not considered to contribute toward double recovery.

Features of a plan that have typically been noted to support a conclusion that the payments are *payments for loss of income* and indemnification are as follows:

1. premiums paid were tied to employment;
2. in order to receive a benefit, a person must have been employed;
3. benefit entitlement was based on a Functional Ability Test related to performance of an occupation;
4. the amount of benefit entitlement was based,

in part, upon earnings received during the course of employment.

Features supporting a conclusion that payments are not payments for loss of income and not indemnification have been noted to be as follows:

1. the insured person does not have to demonstrate pecuniary loss in order to receive a benefit;
2. the person does not have to be employed at the time of the disability commences to receive a benefit; and
3. the amount of benefit payable is not based solely on pensionable earnings earned during employment, but includes a flat rate payable to all recipients.¹

The deductibility of Long Term Disability (LTD) benefits from IRB entitlement can significantly reduce the automobile insurer’s exposure. When LTD payments are terminated and the IRB payer is satisfied that there is ongoing entitlement, the IRB payer pays at the full 80 per cent of net income, to the maximum of \$400 a week, subject to repayment if and when the LTD payer is: (a) pursued, and (b) the insured receives further LTD benefits.²



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Most SABS insurers assumed that all payments received from the LTD carrier, net of costs, following legal pursuit of benefit entitlement, would accrue to their benefit as a credit as payments for loss of income under an income continuation benefit plan. This assumption would include not only past amounts paid, but future benefits that might be the subject of a net present value calculation and lump sum settlement. Most tortfeasors would make the same assumption for deductibility under Ontario tort law (another topic unto itself).

In *Cromwell v. Liberty Mutual Insurance Co.*, the plaintiff sought entitlement to the full IRB amount due under the Liberty policy. At the time of the accident, the plaintiff was also insured under a policy with Sun Life, which included LTD benefits. The plaintiff's application for LTD benefits had been denied by Sun Life, and she commenced an action for breach of contract and damages for bad faith and mental distress. A settlement was reached with Sun Life wherein the plaintiff executed a release of all claims in exchange for the payment of a non-specified \$160,000 non-taxable sum, and a \$93,485 past benefit taxable sum (\$78,485 of which had been made as an advance payment). Liberty took the position that the amounts qualified for a collateral deduction under the SABS, and that it was entitled to recoup an overpayment that resulted when the plaintiff received both IRBs and LTD benefits for the past. It also claimed an ability to take a credit for the weekly LTD amount from the \$160,000 payment, on a declining balance, arguing that this amount was made up of future payments for loss of income under the LTD policy.

The Court made the general determination that the Sun Life policy was a policy of indemnification. However, a further question to be determined was whether the \$160,000 non-taxable lump sum payment could be classified as a payment received "under any income continuation benefit plan." In Sun Life's view, the \$160,000 payment represented future payments and costs. The plaintiff argued the claims in the action against Sun Life did not include any claim for future benefits, but merely claims for past benefits, punitive and aggravated damages and damages for mental distress. Liberty argued the payment represented future monthly payments for loss of income. The Court noted Sun Life was not obliged under the terms of its policy to pay a lump sum with respect to future payments, and indicated there was no evidence before the Court the lump sum was in any way calculated by taking into account the future value of benefit payments. Additionally, the Court noted claims against Sun Life in respect to mental distress, punitive and aggravated damages were also released. On these bases, the Court held that the \$160,000 payment did not qualify as "net weekly payments for loss of income . . . under any income continuation benefit plan," and Liberty Mutual was not entitled to a deduction for any portion of that amount.

In *Vanderkop v. Personal Insurance Company of Canada*,

the plaintiff was considered to have met the test for entitlement to receive IRBs under the SABS. She was also insured under a policy of insurance with Manulife, which included LTD benefits. Manulife denied the plaintiff's claim for disability benefits, and she commenced an action, seeking entitlement to LTD benefits, aggravated and punitive damages, and damages for mental distress. At mediation, the plaintiff entered into a settlement with Manulife wherein she released all entitlement to past, present and future benefits under the Manulife policy in exchange for a lump sum payment of \$57,500.

Following the settlement, the personal sought repayment of IRBs, taking the position that it was entitled to deduct the amount of the LTD payments from the weekly benefit payable. The LTD benefit amount exceeded the IRB payable. The plaintiff took the position there were no benefits "available" to her from Manulife, as her application for benefits had been denied. She claimed entitlement to the full IRB amount due under the personal policy. The personal argued the plaintiff was obligated to litigate the issue of availability with Manulife, and by settling her claim, she had withdrawn her application for benefits.

The Court concluded the monies paid pursuant to the settlement could not be characterized as "net weekly payments for loss of income." Rather, relying on the reasoning of the Supreme Court in *Tsiapraillis v. Canada*, the Court determined the monies represented a lump sum payment negotiated as a compromise after a lawsuit was commenced. Noting there was no allocation of the lump sum settlement as among the various heads of damage claimed, the Court found the personal was not entitled to any deduction in respect of the lump sum payment. The Court stipulated that an insurer seeking to deduct the payment must demonstrate the insured qualifies for the proposed payments in every respect, and noted where a collateral benefit insurer refuses to pay a collateral benefit, the insured cannot be said to be "entitled" to the payment of that benefit.³

The characterization of settlement amounts received from a Long Term Disability Carrier as something other than the payment of available benefits appears to have created an acceptable form of double dipping for plaintiffs. We understand the *Vanderkop* decision is currently under appeal. 🍁

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Reference:

1. see *Cugliari v. White*, 159 DLR (4th) 254 (O.C.A.); *Wilcox v. Economical Mutual Insurance Company (FSCO)*; *Scott v. State Farm (FSCO)*
2. see section 47(1)(c) SABS
3. see *Chrappa v. Ohm*, [1998] O.J. No. 1678 (O.C.A.); *Skinner v. Goulet*, [1999] O.J. No. 3209 (S.C.J.); *Stante v. Boudreau*, 29 O.R. (2d) 1 (C.A.)

