

THE COURT GIVETH AND TAKETH AWAY – CLARIFICATION OF DEDUCTIBILITY OF SABS PAYMENTS AND RECOVERING COSTS OF PURSUING AB BENEFITS

By: Michael Blinick

In two companion decisions, the Court of Appeal has clarified that both past and future AB Benefits are deductible in tort actions even when there is not a strict matching of the amounts owing to a Plaintiff. The Court of Appeal also addressed (in obiter) whether a tort defendant could be required to compensate a plaintiff for its costs of pursuing AB benefits.

In the decision of *Cadieux v. Cloutier* (2018 ONCA 903), 5 judges of the Court of Appeal clarified the process for deducting AB payments from a judgment in a tort action. In this decision, the Court answered whether the Defendants were entitled to deduct the AB benefits for attendant care and med/rehab from the jury's award for future costs of care which consisted primarily of the costs associated with an Acquired Brain Injury Support Worker. The Court of Appeal held that an "apples to apples" application should be avoided and that instead deductions should be made based on silos (the silos being income loss, health care costs and other pecuniary losses). The Court of Appeal stated that the "apples to apples" strict matching approach unnecessarily complicates tort actions and requires the trial judge to undertake a complicated and cumbersome process of matching a head of damage in tort to a particular benefit under the SABS. The Court of Appeal ultimately found that the payment for the Acquired Brain Injury Support Worker qualified as a health care expense and that the amounts paid by the AB Insurer to settle the Attendant Care and Med/Rehab component of the Plaintiff's AB claim were properly deductible from the amount awarded in the tort action.

In *Carroll v. McEwen* (2018 ONCA 902), the same 5 judges of the Court of Appeal clarified the deductibility of future AB benefits. In this case, the Plaintiff was awarded a lump sum payment for her future care costs and the trial judge then granted the insurer defendants the ability to take an assignment for past and future AB payments for attendant care and med/rehab benefits if the two insurers paid the judgment in full. On appeal, the Plaintiff argued that the Judge erred in granting the conditional assignment as the AB benefits did not strictly match the jury award for future costs. The Court of Appeal rejected the strict matching approach advanced by the Plaintiff and instead adopted the silo approach as was set out in the *Cadieux* decision. The Court of Appeal found that the changes to the *Insurance Act* (the change from providing a deduction for the present value of future benefits to an assignment of future benefits paid) eliminates the need for strict matching of future benefits as these changes eliminated the possibility of possible under-compensation by the Plaintiff.

Another interesting component of the *Cadieux* decision was that the Court of Appeal highlighted that the costs associated with pursuing an AB claim that reduces a tort defendant's exposure are potentially payable by the tort defendants. The Court stated that the following factors should be considered when determining whether to award a Plaintiff the costs associated with pursuing a claim as against the AB insurer:

1. The fees and disbursements actually billed to the plaintiff in pursuit of the SABS;
2. Relevant factors as set out in Rule 57.01 (including whether the litigation of the AB claim involved particular risk or effort);
3. Proportionality of the legal costs and expenses incurred by the Plaintiff in securing AB benefits to the benefit of the tort defendants;
4. Whether the AB claim was resolved by way of settlement or arbitration;
5. Any costs paid by the AB insurer as a result of settlement or arbitration;
6. Whether all or any portion of the costs were incurred as a result of unusual or labour-intensive steps that should not reasonably be visited upon the tort defendant;
7. Whether or not the Plaintiff's lawyer was acting on a contingency basis; and
8. The overall fairness of allocating the costs associated with pursuing AB benefits on the tort defendant.

This was noted to be of greater significance now given the limited availability of costs to a party who advances a claim for benefits before the License Appeal Tribunal.

Impact for Defendants and their Insurers

The Court of Appeal's decision eases the challenge of assessing potential 'net' exposure by simplifying the determination associated with the potential deductions / assignments available to defendants. By rejecting the "apples to apples" matching approach, the Court of Appeal has confirmed the principle of avoiding double recovery and clarified (read: simplified) a Judge's tasks at trial. These decisions ought to be applauded by all litigants as the Court has adopted a common sense approach.

That said, the Court of Appeal's comments in obiter about the availability of tort defendants to pay a plaintiff's costs in seeking AB benefits could add a new head of damage to a defendant's potential exposure. Should these costs be sought, a fulsome analysis of the costs incurred/claimed ought to be undertaken to determine whether recovery in these instances is reasonable and appropriate.

As the saying goes, the Court giveth and the Court taketh away. Stay tuned to see how these decisions impact claims handling and Defendants' liability exposure.