

ICBC Claims, CPP Disability And Deductibility Of Wage Loss Awards

November 21st, 2008

Reasons for judgement were released today dealing with the issue of whether a defendant ordered to pay a plaintiff money for future wage loss as a result of a BC motor vehicle accident can deduct from such an award disability benefits the Plaintiff will receive from the Canada Pension Plan (CPP).

The Plaintiff was injured in a 2005 motor vehicle collision. Liability was not seriously contested and the Defendant was found 100% at fault at trial. The Plaintiff suffered serious injuries including a

1. *Fractured sternum; and*
2. *Head injury with probable significant cerebral concussion; and*
3. *Contused lower thoracic spine and upper lumbar spine; and*
4. *Multiple rib contusions.*

The most contested injury was whether the Plaintiff suffered from on-going problems as a result of a brain injury allegedly sustained in the collision. The court found for the Plaintiff noting that

[71] On balance I conclude that I accept the expert evidence to the effect that it is more likely than not that there are persisting, but very mild, sequelae from the mild traumatic brain injury affecting cognition. The effects on Mr. Kean's cognition are so subtle as to be virtually indistinguishable from the concurrent effects from the other operating causes, namely pain, pain medication, and depressed mood.

The Court assessed damages as follows:

Non-pecuniary damages:

Past wage loss:

Future earning capacity loss:

Future care costs:

Special damages:

ICBC argued that money the plaintiff has/will receive from CPP should be deducted from his awards for past wage loss and future wage loss awards. The court dismissed this argument concluding that "the law in this jurisdiction is settled to the effect that CPP disability benefits fall within the insurance exception to the rule against double recovery and should not be deducted from tort awards for past or future wage loss"

The key discussion took place at paragraphs 102 - 111 which I reproduce below:

[102] Counsel for the defendant and the third party argued that CPP disability benefits received by Mr. Kean should be deducted from his award for past wage loss, and the present value of future CPP disability benefits should be deducted from his future income award. The thrust of their argument is that this is necessary to prevent double recovery. The defendant argues that CPP disability benefits are a form of mandatory social insurance that workers cannot negotiate out of, and the scheme is a form of income replacement.

[103] The defendant's argument is essentially the same argument that these same counsel made unsuccessfully in the case of **Maillet v. Rosenau** 2006 BCSC 10. In **Maillet**, the plaintiff had received social assistance payments which were deducted from the past wage loss, but Powers J. did not accede to the defendant's argument that future CPP disability benefits should be deducted from the award for losses of future earnings. As here, the defendants relied on the case of **M.B v. British Columbia**, 2003 SCC 53, suggesting that the rationale applied in that case to conclude that social assistance payments were deductible from a future wage loss award, was equally applicable to CPP disability benefits and that the decision represented a change in the law.

[104] In **Maillet**, Powers J. followed a line of authority which had held that the CPP disability pension scheme was essentially an insurance scheme and covered by the insurance exception to the rule against double recovery. This line of authority includes **Canadian Pacific v. Gill**, [1973] S.C.R. 654, **Hayre v. Walz** (1992), 67 B.C.L.R. (2d) 296 (BCCA) and **Cugliari v. White**, (1998) 159 D.L.R. 4th 254 (Ont.C.A.).

[105] Like Powers J, I do not see the reasoning in **M.B.** as effecting a change in the law as it applies to CPP disability payments. The analysis undertaken in that case was outlined in ¶24 of the decision:

The first question is whether social assistance is a form of income replacement. If it is not, no duplication arises. If it is, the further question arises of whether social assistance can be excluded from the non-duplication rule under an existing or new exception.

[106] The court determined that social assistance was a form of income replacement and then stated in ¶28:

It follows that the only way in which they can be non-deductible at common law is if they fit within the charitable benefits exception, or if this court carves out a new exception. Otherwise, retention of them would amount to double recovery.

[107] After holding that social assistance payments did not fit the charitable benefits exception (because the rationale for that exception did not concern the purpose of charitable donations, but its effect on the owners and the difficulties of valuation), the court discussed whether it should carve out a new policy-based exception. The court decided that it should not do so. Clearly there was no viable argument that the insurance exception might be applicable to social assistance and that was not considered.

[108] The defendant wishes to characterize the CPP disability payments as a form of social security because it is a legislative creature and contributions are mandatory. But, unlike social assistance, it is funded by contributions and only those who have contributed can benefit. There is an overlap of recovery, but that is inherent in the insurance exception to the rule against double recovery. The other side of the coin is that to deduct the CPP benefits from a tort award is to force the injured contributor to share the benefits of his contributions, (which represent deductions from his former earnings), with the tortfeasor.

[109] The defendant's book of authorities included, in fairness, the case of **Sulz v. Minister of Public Safety and Solicitor General** 2006 BCCA 582, which was decided shortly after the **Maillet** decision. In **Sulz**, the British Columbia Court of Appeal quotes from Mr. Justice Iacobucci in **Sarvanis v. Canada** 2002 SCC 28 at ¶33:

*....it has already been held by this court that CPP disability payments are not to be considered indemnity payments, and therefore that they are not to be deducted from tort damages compensating injuries that actually caused or contributed to the relevant disability. See **Canadian Pacific Ltd. v. Gill**; **Cugliari**, supra. This rule is passed on the contractual or contradictory nature of the CPP. Only contributors are eligible, at the outset received benefits, provided that they then meet the requisite further conditions.*

[110] *The issue in **Sulz** was the deduction of superannuation pension from a tort award. The British Columbia Court of Appeal, in a decision written by Madam Justice Levine, (who was the trial judge in **M.B.** whose deduction of social assistance payments was upheld by the Supreme Court of Canada) said, at ¶65:*

The superannuation pension received by the respondent is of the same character as CPP disability benefits and other pension payments, which have consistently held to be non-deductible from tort damages.

[111] *I conclude, as did the court in **Maillet**, that the law in this jurisdiction is settled to the effect that CPP disability benefits fall within the insurance exception to the rule against double recovery and should not be deducted from tort awards for past or future wage loss.*

NOTE - the reasoning of this case may not apply to all ICBC claims. For example in ICBC UMP Claims where ICBC is entitled to certain statutory deductions from the damages they need to pay to an insured.