Double Deduction against your Damages? A Defence Perspective.

This follows our March 9, 2011 blog wherein we commented upon the deduction allowed for income replacement benefits ("IRB"), in the 2011 Ontario Superior Court of Justice case of Sutherland v. Gurmeet Singh.

From an insurer / defence perspective, the Sutherland decision properly addresses the purpose of Ontario's Insurance Act (including Section 258.3), which is to require claims for injury and loss arising from car accidents to undergo the rigour and testing of the Accident Benefits regime, which then carries forward into the tort lawsuit.

That is, the Accident Benefits (i.e. "no fault") system, also known as "SABS", was designed to complement and work with the tort system. Anyone involved in a car accident is required to apply for SABS in a timely manner – see Section 32 of SABS.

The philosophy behind the two systems is that a person who is injured in a car accident must apply immediately to Accident Benefits and enter into the disciplined structure of that system. Various checks and balances are built into the Accident Benefits regime, which requires insured claimants to provide various information to the SABS insurer, who then tests / investigates the various claims being made in Accident Benefits.

For example, the Accident Benefits carrier would investigate the income replacement benefits claim, including testing the ability of the injured claimant as to their ability to work. The SABS insurer may send the claimant to various medical examinations to test their ability to work; they may send them to a FAE (functional ability evaluation); vocational testing may be performed and a workplace investigation, including their work history, might be performed.

All of this investigation would be produced, eventually, to the tort defendant during the course of the tort lawsuit.

Given that a tort lawsuit does not have to be commenced for up to two years after the accident, the tort defendant (i.e. their insurance company) has the benefit of a typically rigorous Accident Benefits file, wherein the SABS insurer has tested the plaintiff's various claims, as the starting point of the tort defence.

If there is no claim to be tested in SABS, as was the situation in the Sutherland case, then the tort defendant is left without that ability to properly defend (as was anticipated in the provision of the Insurance Act) that tort lawsuit.

Put another way, in Sutherland, the plaintiff did not choose IRB benefits against the AB insurer. Therefore, the IRB claims presumably would not be investigated or tested until the tort defendant is served with the lawsuit – potentially 2 ½ years after the accident. At that time, the ability of the tort defendant to defend against the income loss claim would, in the defendant's view, be significant compromised.

For further background, readers can review our blogs on: (1) accident benefits; and (2) income replacement benefits.

Gregory Chang
Toronto Insurance Lawyer