Focus INSURANCE

A heavy burden of proof to deduct benefits

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The decision of Madam Justice Darla Wilson, in *Hoang v. Trieu* [2013] O.J. No. 321, quite properly clarifies that only in the rarest of cases will a defendant in a personal injury action be permitted to deduct the value of a future stream of accident benefits from a tort award for future pecuniary loss.

In this case, following a seven-week trial, the jury assessed the damages of the injured plaintiff at just over $684,000 for future medical treatment, rehabilitation, attendant care, housekeeping and home maintenance. In *Hoang*, the defendant's counsel sought an order reducing the award by the amount available to the injured plaintiff pursuant to the statutory accident benefits schedule. As the plaintiff had been designated catastrophically impaired, had the defendant's argument been accepted, the amounts remaining available pursuant to the schedule would have effectively reduced the defendant's obligation to pay the jury's award for future cost of care to zero.

Once an accident benefit insurer accepts that a plaintiff's injuries/impairments meet the definition of catastrophic, the plaintiff has access to a maximum of $1 million for reasonable and necessary medical and rehabilitation expenses incurred over the remainder of their life, a second maximum of $1 million for attendant care expenses over the remainder of their life, and a further maximum of $100 per week for incurred housekeeping and homemaking expenses. Each of the categories of medical/rehabilitation costs, attendant care costs and housekeeping and homemaking costs are routinely presented as heads of damages for a future pecuniary award in the plaintiff's tort case. To avoid a situation where a plaintiff receives double recovery, provisions in sections 267.8 (9), (10) and (12) of the *Insurance Act* require the plaintiff to co-operate with the defendant or defendant's insurer and to hold in trust all payments received after the trial from the accident benefit insurer for heads of damages that were compensated by the trier of fact.

Defendant Hoang's counsel sought an order for the above described assignment of the plaintiff's rights to future accident benefits as a means or recovering the amounts awarded by the jury for future medical treatment, rehabilitation, attendant care, housekeeping and home maintenance, but only as an alternative to an order granting a one-time deduction for the value of the future stream of payments. Like many plaintiffs, the defendant preferred a one-time payment rather than receipt of funds in dribs and drabs over years and even decades. Unfortunately, there is no provision in the *Insurance Act* to compel an accident benefit insurer to make a lump sum payment equivalent to the value of the anticipated future stream of payments. Plaintiffs are required to establish ongoing entitlement to each of the benefits claimed over the entire life of the claim. The relationship between the injured party and the accident benefit insurer (who is typically the person's own insurer) can often be very adversarial. It is not uncommon for issues of entitlement to be litigated in court or adjudicated on by an arbitrator at the Financial Services Commission of Ontario.

Recognition of the sometimes adversarial nature of the relationship between claimant and their accident benefit insurer underlies the ruling of Justice Wilson. In dismissing the defendant's motion to reduce the damages for future health care expenses by the value of the expected future payments pursuant to the statutory accident benefits schedule, the judge makes it clear that a defendant seeking such a deduction faces a very strict burden of proof and that a deduction will only be made if the defendant places "persuasive evidence" before the court to demonstrate that it is "patently clear" the plaintiff qualifies for the future benefits. She further states that it is not sufficient that there be a likelihood or a probability that the future benefits will be received.

In my experience, the type of proof required simply does not exist unless the plaintiff has entered into a full and final settlement of entitlement to future benefits under the schedule. This is a sensible approach when one considers who is in a better position to bear the risk of non-payment of a future benefit: a plaintiff, who has established need before a jury, or a defendant who has caused the harm.

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Kruger: What makes sense is a prime consideration

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ance covenants are intended to flow to the "benefit" of parties such as a tenant or bailee.

In the leave application, Scott argues *Kruger* significantly expands the tort immunity subrogation bar defence and that the contractual terms of this specific case were not properly considered. The trial judge accepted that a bailee is not an "insurer," and is not always responsible for losses from causes that are not the bailee's own fault. Where, however, the bailee is at fault, the trial judge concluded it would impair the duty of care and render the agreement's indemnity provisions meaningless if the tort immunity subrogation bar applied (*Kruger Products Limited v. First Choice Logistics Inc.* [2010] B.C.J. No. 2333). Scott argues this is the proper conclusion when the entire agreement is considered. In contrast, FCL argues *Kruger* is correctly decided and consistent with the law, including *North Newton*.

Regardless of whether leave is granted, the underlying practice points for insurance counsel handling subrogated claims are clear — always assess the entirety of any agreement, the specific agreement terms and what makes "commercial sense." These fundamentals remain unchanged and are guiding each level of court in *Kruger*.

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