

Further Insight into Deductibility of Collateral Benefits

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January 2021

In a recent case before the Ontario Superior Court of Justice, the Court was once again faced with a question surrounding the deductibility of collateral benefits in the motor vehicle accident context.

In *Finnemore v. Hyde et al*¹, which arose from a 2016 motor vehicle accident, the defendants brought a motion pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure* for a determination of an issue prior to trial, namely whether the plaintiff's disability pension benefits were deductible from damages for income loss.

Benefits at Issue

The benefits at issue on the motion were disability pension benefits received by the plaintiff pursuant to the terms of his union pension plan.

Although the motion judge noted that characterization of the disability pension benefits was a contentious point, after reviewing the evidence on the motion (which did not include the actual pension plan), His Honour imputed the following characteristics to the benefits:

- entitlement to the benefits was subject to the union member becoming totally and permanent disabled, as determined by whether the member was entitled to receive Canada Pension Plan ("CPP") or Quebec Pension Plan ("QPP") disability benefits;
- the member had to be at least 55 years of age to start receiving the benefits;
- the quantum of the benefits was determined by the amount of pension accrued under the plan, not by the member's actual income;
- the member, once totally and permanent disabled, would be entitled to retire and receive a disability pension, with no reduction for early retirement;
- the member would be entitled to the benefits until death, unless the member returned to a regular occupation;
- the member would not be disabled if the member engaged in a regular occupation for remuneration or profit.

When the plaintiff opted to retire post-accident, he was entitled to CPP disability benefits and was thus eligible for his union disability pension benefits.

Importantly, the motion judge noted that since the amount for those benefits was not calculated pursuant to the plaintiff's income, the benefits would be classified as "non-indemnity benefits".

Applicable Legal Framework

The motion judge outlined the legal framework applicable to the deduction of collateral benefits.

While, at common law, payments received under an insurance policy are generally not deductible from tort awards despite potential double recovery to the plaintiff, the *Insurance Act* statutorily overrides that common law private insurance exemption for certain collateral benefits in the motor vehicle accident context.

The relevant *Insurance Act* provisions in this regard are sections 267.8(1), (9) and (12). Where section 267.8(1) addresses the deduction of specific collateral benefits received or available prior to trial, sections 267.8(9) and (12) address the handling of specific collateral benefits received by or to which the plaintiff is entitled post-trial.

For the purposes of the motion before the Court, the issue to address was whether the plaintiff's disability pension benefits constituted "payment in respect of the incident....for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation plan" pursuant to the applicable provisions of section 267.8.

Positions of the Parties

On the motion, the plaintiff contended that the disability pension benefits were not deductible, relying on the decision of *Demers v. B.R. Davidson Mining and Development*².

In *Demers*, the Court of Appeal reviewed the deductibility of CPP disability benefits and Hospital of Ontario Pension Plan ("HOOP") disability benefits for an accident occurring in 1999, under a previous *Insurance Act* regime (governed by Bill 59).

In that case, Laskin J.A. held that neither the CPP disability benefits, nor the HOOP disability benefits, were deductible, noting that entitlement to neither benefit depended on the plaintiff being employed at the time of application or on the plaintiff proving or suffering an income loss, thus being non-indemnity payments. Rather, the benefits were paid on account of the plaintiff's disability.³

In *Finnemore*, the plaintiff argued that *Demers* was determinative of the issue, because the plaintiff's disability pension benefits in question were analogous to the HOOP disability benefits – and thus not deductible.

Further, the plaintiff contended that the disability pension benefits stemmed from the plaintiff's pension plan, to which he had been contributing over the course of his career – making the benefits his property, and not benefits payable as a continuation of the plaintiff's wages or sick leave, nor benefits from insurance.

The defendants argued that *Demers* was distinguishable. Among other things, the defendants contended that *Demers* was determined under the outdated Bill 59 regime, with the present action governed by Bill 198.

The defendants also contended that the focus in *Demers* was inappropriately on the questions of whether the disputed collateral benefits could be classified as indemnity or non-indemnity payments, when the focus should have been on whether they were payments for “loss of earning capacity”, and that Laskin J.A. only undertook a cursory statutory interpretation of section 267.8 in relation to the HOOP benefits.

The defendant sought that the motion judge rely on pre-*Demers* decisions wherein disability benefits had been deemed deductible.

Disposition of the Court

Justice Nicholson agreed with the plaintiff that the disability pension payments in question were payment made from the plaintiff's vested pension plan – his own property.

His Honour did not agree with the defendants critique of *Demers*, finding that Laskin J.A. did engage in a thorough analysis of the deductibility of the HOOP benefits.

With respect to the defence argument that *Demers* inappropriately considered the distinction between indemnity and non-indemnity payment in its analysis, His Honour noted that such a distinction continues to be made – as demonstrated in the Supreme Court of Canada's decision in *IBM Canada Limited v. Waterman*⁴.

Moreover, Justice Nicholson concluded that he was bound by *stare decisis*. While acknowledging that *Demers* was decided under a previous regime (Bill 59), His Honour noted that the subsequent changes made in Bill 198 did not expressly provide for the deductibility of retirement pension disability benefits, save for the express inclusion of wording to effect the deduction of CPP disability pension benefits. Thus, the highest provincial court had analyzed the deductibility of such benefits as those at issue before the Court and ruled they were not deductible.

His Honour noted further that in the years since *Demers*, the legislature has not seen to amending the section 267.8 scheme to effect the deductibility of retirement disability pension benefits. Thus, the law remains that such benefits, including the HOOP benefits in *Demers*, are not presently deductible from damages for income loss or loss of income earning capacity.

His Honour held that non-indemnity payments, such as pension benefits, are not deductible at common law. In the motor vehicle accident context, collateral benefits are only deductible if expressly provided for by the applicable provisions of section 267.8 of the *Insurance Act*. The disability pension benefits at issue did not fall within the collateral benefits categories provided for by section 267.8.

Accordingly, it was ordered that the plaintiff's disability pension benefits were not deductible pursuant to section 267.8(1), nor subject to the trust or assignment provisions of section 267.8(9) or (12) of the *Insurance Act*.

Take-Aways

Assuming that the plaintiff's disability warranting entitlement to both CPP disability benefits and the disability pension benefits arose as a result of the accident, the decision in *Finnemore* is perhaps not the most intuitive to digest. That said, the reasoning appears sound in the face of the characterization of the disability pension benefits, the legislative wording, and the binding authority in *Demers*.

Notably, Justice Nicholson agreed with the defence that the approach to be taken was not one where simply every disability pension benefit was to be found not deductible. His Honour outlined that the approach must be to review the specific collateral benefits in question and assess whether they "match" the criteria of section 267.8.

He noted: "The use of the word 'pension' does not make what would otherwise be deductible, not deductible." However, the analysis in the case before him was made difficult by the lack of the precise pension plan wording underlying the impugned benefits.

As such, in cases where the deduction, trust and/or assignment of such benefits may be at issue, defence counsel should ensure that requests are made for all underlying plan documentation. Indeed, this is likely good practice with respect to all collateral benefits that may be subject to section 267.8.

¹ 2021 ONSC 19.

² 2012 ONCA 384.

³ Importantly, subsequent to the accident subject of the litigation in *Demers*, the legislation amended the applicable *Insurance Act* regulations to expressly provide for the deductibility of CPP disability pension benefits, which Laskin J.A. acknowledged in the decision.

⁴ 2013 SCC 70.