

## **Double Recovery for One Accident? The Interplay of Long Term Disability Insurance and Car Accidents**

Frequently, a person hurt in a car accident in Ontario also has the benefit, through their employment, of both a short term disability insurance policy (STD) and also a [long term disability policy \(LTD\)](#).

If the injured person starts a lawsuit for damages arising from the car accident, then what happens if they also receive monies pursuant to their LTD policy?

Is it possible to receive money twice for the same accident, otherwise known as [double recovery](#)?

Double recovery is an obvious issue that defendants and insurers take note of and dispute in each case. The reasoning is that if the injured plaintiff receives money from one source (i.e. LTD payments for inability to work), then the same injured plaintiff should not receive the “same” payment for income loss from the tort defendant.

In certain circumstances, however, an injured plaintiff may be entitled to insurance proceeds and damages in a MVA action which may appear to overlap. That is, there may be an appearance (to the defendant insurer) of double recovery, which of course would be disputed by the injured plaintiff.

In the recent [2010 Ontario Superior Court of Justice case of Anand v. Belanger](#), the issue was whether a 2007 settlement of the plaintiff’s LTD claim, with Manulife, for \$125,000, all inclusive, was to be deducted from the 2010 Trial decision of her car accident lawsuit in which she received about \$270,000 (including \$25,000 for future income loss and \$161,000 in past income loss).

In *Anand*, Mr. Justice Stinson reviewed [Section 267.8 \(1\) of the Insurance Act, which read:](#)

***Collateral benefits  
Income loss and loss of earning capacity***

***267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:***

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.
3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. 1996, c. 21, s. 29.

Starting at paragraph 20 , Mr. Justice Stinson rules that the \$125,000 LTD payment was not a payment under an income continuation benefit plan" and therefore is not to be deducted from the damages awarded at the 2010 Trial of the car accident lawsuit:

**The ManuLife settlement**

[20] *The question to be addressed here is whether the money that Mrs. Anand received when she settled her law suit against ManuLife was a payment "under an income continuation benefit plan." I note that, unlike the Settlement Disclosure Notice in relation to the FSCO arbitration settlement, the documentation relating to the ManuLife settlement nowhere recites that it is a payment "under an income continuation benefit plan".*

[21] *In my view, this issue was correctly analyzed by Lofchik J. in *Cromwell v. Liberty Mutual Insurance Co.* [2008 CanLII 3409 \(ON S.C.\)](#), (2008), 89 O.R. (3d) 352 (S.C.J.). In that case, Lofchik J. referred to the Supreme Court of Canada judgment in *Minister of National Revenue v. Armstrong*, [1956 CanLII 71 \(S.C.C.\)](#), [1956] S.C.R. 446 (S.C.C.). In *Armstrong*, the court was called upon to decide whether a cash settlement paid by a taxpayer to his former wife for child support in full satisfaction of all further payments under their divorce decree amounted to a payment "pursuant to" an order or judgment in a divorce action, a condition precedent to taxation under the relevant section of the Income Tax Act, [R.S.C. 1985, c. 1 \(5th Supp.\)](#) All three judges who wrote reasons agreed that the payment was not made "pursuant to" a decree, order or judgment. In the words of Locke J. (at p. 449):*

*It cannot ... be properly said that this lump sum was paid, in the words of the section, pursuant to the divorce decree. It was, it is true, paid in consequence of the liability imposed by the decree for the maintenance of the infant, but that does not fall within the terms of the section. [Emphasis in original.]*

[22] *Chief Justice Kerwin applied "pursuant to" similarly (at p. 447):*

*The test is whether it was paid in pursuance of a decree, order or judgment and not whether it was paid by reason of a legal obligation imposed or undertaken.*

*Kellock J. reached the same conclusion (at p. 448):*

*In my opinion, the payment here in question is not within the statute. It was not an amount payable "pursuant to" or ... the decree but rather an amount paid to obtain a release from the liability thereby imposed.*

[23] *In Cromwell, supra, Lofchik J. applied the reasoning in Armstrong as follows (at paras. 40 and 41):*

*[40] Applying that reasoning to the present case, Sun Life was not obliged, under the terms of its policy to pay a lump sum with respect to future payments. There is no evidence before me that the lump sum paid was in any way calculated taking into account the future value of those payments but was rather arrived at on the basis of the amount of money available under the authority of the person authorizing the settlement. I also consider that the Release delivered also released claims against Sun Life with respect to mental stress, aggravated and punitive damages for which Sun Life denied liability in the Release. On that basis, the payment does not qualify as "net weekly payments for loss of income ... under any income continuation benefit plan".*

*[41] I am fortified in this view by the fact that the Concise Oxford Dictionary, 10th Edition, provides that the word "under" means, "as provided for by the rules of; in accordance with". The same dictionary defines "pursuant to" to mean "in accordance with". Thus the use of the word "under" in s. 7(1) of the Statutory Accident Benefits Schedule has the same meaning as the words "pursuant to" as interpreted in the Tsiaprailis decision.*

*(Tsiaprailis. v. Canada, [2005] S.C.J. No. 9 is a Supreme Court of Canada decision which approved the reasoning in Armstrong almost fifty years after it was written.)*

[24] *In the present case, the release signed by Mrs. Anand in favour of ManuLife released all claims against ManuLife "from ... any and all manner of actions ... claims ... with respect to the [LTD policy], including but not limited to non-payment of disability benefits ... for damages, punitive or otherwise relating to ... non-payment of any disability benefits ...."*

[25] *Moreover, at the time the settlement was effected, ManuLife's obligations did not include future payments, since Mrs. Anand's entitlement to them was dependent upon her disability continuing. Nevertheless, the parties agreed to resolve all disputes between them,*

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*whether relating to past or future obligations of ManuLife, relating to disability payments, punitive damages, interests and costs.*

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[26] *I conclude, consistent with the reasoning of Lofchik J. in Cromwell, that the payment made by ManuLife to settle Mrs. Anand's claim against them was not a payment "under an income continuation benefit plan"; rather, it was a payment to settle a legal obligation that one party sought to enforce by litigation. Therefore it follows that this payment falls outside the scope of s. 267.8(1)2.*

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