

## BC Personal Injury Claims And Sick Leave Benefits

January 24th, 2009

Imagine that you are injured through the fault of another in British Columbia. As a result of your injuries you become disabled and are unable to return to work for a period of time. Fortunately you have a good job and have built up a 'sick bank' at work and you are able to draw from this during your period of disability. When you bring your claim against the person responsible for injuring you are you able to claim your lost wages? [Reasons for judgement were released yesterday by the BC Supreme Court](#) addressing this issue.

In this case the Plaintiff was injured in 2005 in a motor vehicle collision. The Plaintiff was unable to work for a few weeks as a result of injury. The Plaintiff had built up a sick bank and drew from this. In her ICBC claim she claimed compensation in an amount equivalent to the hours depleted from her sick bank. In awarding the Plaintiff this money the court engaged in a very thorough and well reasoned discussion of the law addressing this topic which I am pleased to reproduce below:

[56] *This court has long recognized the loss of sick bank credits as a compensable loss (see generally: **McCready v. Munroe** (1965), 55 D.L.R. (2d) 338, 54 W.W.R. 65 (B.C.S.C.)). In **Lavigne v. Doucet** (1976), 14 N.B.R. (2d) 700 at para. 12 (C.A.), the New Brunswick Court of Appeal held that the depletion of a plaintiff's accumulated sick leave arising from injuries suffered in an accident removed a benefit that he or she would otherwise have and, therefore, constitutes a genuine loss. That conceptual approach was approved of by McLachlin J. (now the Chief Justice) in **Ratych v. Bloomer**, [1990] 1 S.C.R. 940 at 972, 69 D.L.R. (4th) 25:*

*I accept that if an employee can establish that he or she has suffered a loss in exchange for obtaining wages during the time he or she could not work, the employee should be compensated for that loss. Thus in **Lavigne v. Doucet** the New Brunswick Court of Appeal quite rightly allowed damages for loss of accumulated sick benefits.*

[57] *Some years later the issue was revived before the Supreme Court of Canada in **Cunningham v. Wheeler**, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1, where Cory J. confirmed at 13 that an employee who uses sick leave in order to receive wages while off work and loses those sick day credits is entitled to receive compensation.*

[58] *In **Roberts v. Earthy**, 1995 CanLII 1421 (B.C.S.C.) [**Roberts**], Clancy J. held at para. 8 that it was not necessary to adduce evidence showing that any consideration was paid by the plaintiff or negotiated on the plaintiff's behalf through a collective agreement or other employment arrangement. He did so on the basis that the accumulation of sick days is not related to what has come to be known as the insurance exception to the compensatory principle where such supporting evidence is generally required.*

[59] *The case authorities do not appear to support a universal approach to the quantification of the loss flowing from the depletion of sick leave benefits. For example, in **Collins v. Ma**, 1990 CanLII 1634 (B.C.S.C.), the court endorsed a contingency calculation being applied in order to take into consideration the likelihood of an employee drawing on the lost banked sick days in the future. That approach was followed by the court in **Olson v. Nixon**, [1991] B.C.J. No. 155, 1991 CarswellBC 1346 (S.C.).*

[60] *In **Roberts**, however, Clancy J. made no deduction for contingencies. Likewise, more recently in **Choromanski v. Malaspina University College**, 2002 BCSC 771, the court rejected the defence argument that there should be a reduction of the loss taken based on the plaintiff's work history and the rate at which he had traditionally availed himself of his sick benefits.*

[61] *In my view, whether it is appropriate to make deductions for contingencies in quantifying the loss will depend upon the presence or absence of certain factors. Those would include, for example, whether there is a maximum limit of accumulated sick leave, whether the plaintiff is able to cash out accumulated sick leave days on termination or retirement, whether the plaintiff has several years of employment remaining in which to potentially use the sick leave or has only a few months of employment left until retirement with a significant sick leave*

*remaining, or whether the plaintiff has left the employment in which he earned the sick day credits altogether. It cannot be predicted with any degree of certainty whether a person who is healthy today will be so tomorrow. Illness or injury can afflict any one of us at any time. Placing much if any reliance on the plaintiff's past use of sick benefits strikes me as an unsound and potentially unfair approach because it fails to adequately protect a plaintiff against an unexpected serious or catastrophic illness in the future which could occur in any otherwise healthy plaintiff, or against a future injury, which, by its nature, is unpredictable. In neither case would those future events necessarily be related to the plaintiff's past use of sick benefits.*

[62] *I accept that had Ms. Fenwick not used her sick leave credits, she would have been entitled to transfer them from her then employer, the Vancouver School Board, to her new employer, the Coquitlam School Board. As well I am satisfied that, pursuant to her collective agreement, any monies awarded to Ms. Fenwick on account of lost sick days is repayable to her then employer in order to replenish her sick leave bank. Beyond that, the evidence pertaining to the details of the portability of Ms. Fenwick's sick day credits was not well developed. I do not have cogent evidence as to whether there is a maximum number of sick days allowable, the formula for which she has earned them or whether she is able to cash them out on retirement or termination.*

[63] *As best I can decipher from the evidence, the loss that Ms. Fenwick has sustained is a potential future loss in the sense that it would only be experienced if she has insufficient sick leave credits to adequately cover a future period of absence due to illness in respect of which she could have drawn upon the lost sick bank for income continuation.*

[64] *Ms. Fenwick thoroughly exhausted her accumulated sick leave as a result of the accident. She is a relatively young woman in the early stages of her career as a teacher. I have found that she likely will experience flare-ups of her symptoms caused by this accident from time to time in the future which may require her to miss brief intervals of time from work. She may also suffer from other illness or medical conditions in the future which will keep her from work.*

[65] *I am satisfied that fair and reasonable damages for this loss is compensation which reflects the actual hours Ms. Fenwick missed from work and used as sick time, multiplied by her approximate average hourly rate, without deduction. To that, I would add her wage loss stemming from fifteen hours of unpaid absences attributable to her injuries. The total damages amount to \$5,469.18.*

[66] *Ms. Fenwick's counsel raised a concern about whether damages for Ms. Fenwick's lost sick bank entitlement could be validly characterized as pre-trial earnings or income and thereby attract a deduction for income tax pursuant to sections 95 and 98 of the **Insurance (Vehicle) Act**, R.S.B.C. 1996, c. 231. In my view, this kind of loss is not in the character of past wage loss. Accordingly, there will be no deduction for income tax.*