Double Recovery for One Accident? How About a Double Deduction against your Damages? A Plaintiff's Perspective.

After a car accident in Ontario, you are usually entitled to receive some Accident Benefits, regardless of who caused the accident.

One of the decisions that many injured people will make, when applying to Accident Benefits, is whether to receive income replacement benefits ("IRB") or caregiver benefits.

What happens if you choose caregiver benefits, when you could have equally qualified for IRB, and then you go on to commence a tort lawsuit arising from the same accident?

If you claim past or future income loss in the tort lawsuit (or even loss of earning capacity), will you be penalized for failing to have chosen IRB benefits instead of caregiver benefits?

That is, even though you did not receive IRB, will the tort defendant have the benefit of the available IRB payments as a deduction against past and future income loss?

In the 2011 Ontario Superior Court of Justice case of Sutherland v. Gurmeet Singh, the answer was "yes", the tort defendant can deduct the value of the IRB's which were available (but not received) as against any income loss award payable by the tort defendant.

In His Endorsement, Mr. Justice Whitaker states:

> [9] The defendant takes the position that the plaintiff could have chosen income loss benefits and did not, with the result that the value of those benefits are to be deducted from the plaintiff's claim for damages.
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> [10] The parties agree that the underlying purpose behind section 267.8(1) is to prevent double recovery (see *Bannon v. Hagerman Estate* (1998), 1998 CarswellOnt 1755).
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> [11] The plaintiff relies on the proposition that if the application for SAB benefits is made in good faith, then the defendants have no right to deduct the benefits.
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> [12] The dispute here is a narrow one which turns on the construction of the term "available" in section 267.8(1) of the *Insurance Act*. More particularly, the issue is

> whether income loss benefits were available to the plaintiff at the point of making his election as to which of the eligible statutory benefits he wished to receive. Surprisingly, there seems to be no authority directly on point.
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> [13] In my view, the term available must be given its usual plain language meaning in the context of section 267.8(1). Where at the point of making his election for SAB benefits, the plaintiff can choose to receive income benefits but chooses not to as in this case, such benefits must be understood to have been "available" to the plaintiff at the point of the election. If available, then according to the provisions of 267.8(1), such benefits may be deducted from the damages to which the plaintiff is entitled.
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> [14] I conclude that statutory accident benefits for income loss were available to the plaintiff as that term is used in section 267.8(1) of the *Insurance Act* and further - that such payments are deductible from the damages to which he is otherwise entitled.

This decision is troublesome for plaintiff's in motor vehicle accident lawsuits. It is noted:

- that there was no evidence required or presented that the plaintiff made this election of caregivers benefits, instead of IRB, in bad faith;
- that this decision is silent on whether there are any disputes, as between the parties, as to the value of the IRB benefits on a weekly basis. In particular, it is unclear whether the issue of a denial of IRB within the first 104 weeks after the car accident (which is common) would be factored into the tort deduction; the issue of the availability of post-104 weeks IRB is also not addressed; and
- that the decision is silent on whether, in addition to the deduction of IRB against past or future income loss damages, the tort defendant is also entitled to a deduction against health care damages claimed in the tort lawsuit against part or all of the caregiver benefits received under the Accident Benefits system;

Each of the above factors poses problems for plaintiffs who have to make a similar election.

Decision Made in Good Faith. There are various reasons why someone might choose to receive caregiver benefits instead of income replacement benefits – that have nothing to do with attempting to receive "double recovery" against the tort defendant.

Further, there is actually no double recovery by the plaintiff who receives caregiver benefits (instead of income replacement).

On the flip side, the policy argument of the defendant – that the Accident Benefits system is designed to test plaintiff's claim and to challenge their ability to work, thereby helping tort defendants to build their defence – is that by avoiding IRB benefits (and the resulting Insurer's Examinations accompanying those benefits), that plaintiffs may choose to avoid having their overall claim tested early and repeatedly by Accident Benefits insurers.

Valuation of Income Replacement Benefits. This is a significant problem, because the tort defendant is likely to claim a full deduction to 104 weeks and then attempt to claim a further deduction post-104 weeks. In reality, many plaintiffs do not receive a full 104 weeks of IRB, as a result of various Insurer Examinations.

Double Deduction – Caregiver and IRB. Unless the defendant in this case concedes that they cannot deduct caregiver expenses and IRB, then this is a looming problem that presumably will require further Court clarification. If the plaintiff had chosen IRB initially, then there would be no tort deduction on the issue of caregiver expenses (because the plaintiff would not receive caregiver benefits in Accident Benefits). As it stands after this decision, it is unclear whether the tort defendant would be entitled to two separate deductions, one for income replacement benefits and the other for caregiver - *which is not contemplated nor available* under the Accident Benefits regime.

Gregory Chang
Toronto Insurance Lawyer