

ICBC Injury Claims And “Collateral Benefits”

December 20th, 2008

Imagine if you are injured through the fault of another BC motorist and become disabled from work. You are lucky enough to have wage loss disability benefits through your employment (or your spouse’s employment). When you advance your ICBC injury claim are you entitled to claim your past wage loss or will you be prohibited in claiming this money from ICBC because you already received money for past wage loss from your private insurer? The short answer is you can claim this money provided that you paid some consideration for receipt of your private insurance benefits.

Reasons for judgment were released this week by the BC Supreme Court dealing with the ‘private insurance’ exception to the rule against ‘double recovery’ in BC tort claims.

In this case the Plaintiff was injured in a BC car crash. She needed therapies to treat her injuries. The cost of these therapies were covered largely through an extended health plan through her husband’s employment. The issue to be decided at trial was whether the Plaintiff could recover the actual costs of her therapies or only that portion not covered by the private insurer.

Madam Justice Bruce summarized the law addressing the ‘private insurance’ exception to the rule against double recovery as follows:

[7] *The general rule in an action for damages arising out of negligence is that the plaintiff is only entitled to be restored to the position she would have been in had the accident not occurred. The plaintiff is awarded damages for her actual loss and no more: **Cunningham** at para. 5 per McLachlin J. (dissenting in part)*

[8] *The law has recognized a limited exception to the rule against double recovery which is referred to as the “private insurance” exception. In **Cunningham** at para. 75 Mr. Justice Cory, speaking for the majority, adopts the following passage from **Bradburn v. Great Western Rail Co.**, [1874-80] All E.R. 195 as accurately describing the underlying rationale for the exception:*

... I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, “laying away for a rainy day”. He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. ...and I think that it ought not, upon any principle of justice, to be deducted from the amount of damages proved to have been sustained by him through the negligence of the defendant.

[9] *Whether the plaintiff has paid for private insurance or has obtained these benefits through an employment contract, the exception will apply. It is also irrelevant that it is the plaintiff’s husband who secured these benefits. See, **Brennan** at para. 182-3. However, the onus rests with the plaintiff to prove he or she has paid for the provision of insurance benefits in some fashion. As Cory J. says in **Cunningham** at para. 94:*

*In my view, **Ratych v. Bloomer**, supra, simply placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits. I think the manner of payment may be found, for example, in evidence pertaining to the provisions of a collective bargaining agreement just as clearly as in a direct payroll deduction.*

[10] *There is no evidence before the court as to what, if any, consideration passed between Mr. Napoleone and his employer in respect of the extended health benefits. There is no evidence of whether Mr. Napoleone pays*

all or a portion of the insurance cost or whether it was negotiated as a part of a collective bargaining scheme. The only evidence before the court is that the plan was secured through Mr. Napoleone's employer and it covers 80% of Mrs. Napoleone's health related expenses.

[11] *Without an evidentiary foundation to support the claim, I am unable to apply the private insurance exception to the case at hand. As Cory J. says at para. 93 of **Cunningham**, it is only when this evidentiary requirement is met that the court may be satisfied the plaintiff has shown the prudence and corresponding deprivation that underlies the exception and permits double recovery.*

[12] *For these reasons, I must dismiss Ms. Napoleone's claim for the gross cost of the special expenses.*

This case shows that it is essential to lead evidence at trial that there was some cost associated with being entitled to receive the collateral benefits to be able to receive compensation for the losses those benefits covered in an ICBC tort claim. This can be done in any number of ways such as showing deductions from a paycheque to pay for a private insurance plan or showing that the private insurance was negotiated from the employer at the expense of some salary. This is a particularly important matter to think about when preparing for trial if you signed a 'reimbursement agreement' with your private insurer to pay back the benefits.