

Insurer Obtains Assignment of Long-Term Disability Benefits Following Motor Vehicle Accident Trial

April 12, 2018

On April 5, 2018, Madame Justice Sylvia Corthorn released a post-trial ruling in *Nemchin v. Green*, 2018 ONSC 2185, awarding an insurer an assignment of future long-term disability (“LTD”) benefits. The ruling also considered the applicable interest rate for non-pecuniary general damages.

Justice Corthorn’s ruling provides defendants with a helpful decision while we await the outcome of two Court of Appeal cases to be heard this May and the result of a leave application to the Supreme Court of Canada. These pending cases are discussed further below.

Nemchin v. Green— Assignment of LTD Benefits and the Applicable Interest Rate

The plaintiff was injured in a 2010 motor vehicle accident. The jury found the defendant driver negligent and the plaintiff 10 per cent contributorily negligent. The plaintiff was awarded \$125,000 in general damages and \$600,000 for future loss of income. With the 10 per cent reduction for contributory negligence, the plaintiff was entitled to judgment of \$112,500 in general damages and \$540,000 for future loss of income.

The plaintiff was receiving LTD benefits at the time of the trial. The defendant brought a motion after the verdict requesting an assignment of these future LTD benefits pursuant to s. 267.8(12) of the Insurance Act. The requested assignment would continue until the plaintiff reached the age of 65 or the full amount of the damages paid towards loss of future income is exhausted. Justice Corthorn recognizes in her ruling that the purpose of s. 267.8 is to “ensure that a plaintiff in motor vehicle accident litigation does not achieve double recovery.” This purpose is balanced against the concern that a plaintiff should be fully compensated for her loss.

The plaintiff argued that future LTD benefits should not be assigned as the jury questions did not permit the trial judge to carry out “temporal matching” between the damages awarded and her future LTD benefits and that, as a result, there was a risk that the plaintiff would be undercompensated. Justice Corthorn disagreed for four reasons:

1. The defendant was within her right to request that the jury be given the option to answer the future income loss question as a global award. A jury is not required to provide figures upon which it relies for annualized loss of income or the number of years over which the loss occurs and is entitled to award income loss as a global award
2. There is no requirement for temporal matching of LTD benefits received over time to an annualized amount for loss of future income. The Court of Appeal in **Cobbv.Long Estate** concluded that it could not import temporal requirements **that were not included in the Insurance Act**.
3. The global damages award for loss of future income did not preclude Her Honour from deciding the collateral benefits issue. In a jury trial it is the jury that awards **the plaintiff's damages and, after the jury's verdict is rendered, the trial judge is solely responsible to address the impact, if any, of the plaintiff's receipt of or entitlement to collateral benefits**.
4. The plaintiff would not be undercompensated as a result of the assignment. The defendant would only be entitled to the assignment if the defendant were to pay the plaintiff the damages owed for the future loss of income. Once the defendant completed payment, the plaintiff would then be fully compensated for the loss of future income.

The plaintiff also argued that the length of the assignment should be until the age of 60 not 65. The jury verdict did not award the plaintiff the full amount of the income loss that she had requested and, as a result, the plaintiff argued that the jury assumed a younger **retirement age than 65. Justice Corthorn rejected this submission as the plaintiff's inconsistent work history was a likely factor in the verdict.**

Accordingly, the defendant met the onus to obtain the assignment. Practically speaking, the value of the assignment is \$540,000 and has the potential for the insurer to recover the income loss award paid to the plaintiff as long as the plaintiff remains in receipt of LTD benefits.

Interest Rate

Justice Corthorn's ruling also addressed the appropriate pre-judgment interest rate. The Court of Appeal held in **Cobbv.Long Estate** and **El-Khodrv.Lackie** that 2015 amendments to the Insurance Act applied retrospectively (as discussed in an earlier BLG alert) and as a result it was the defendant's position that the applicable interest rate was 1.3 per cent (not 5 per cent as would have been the case prior to the Insurance Act amendments).

The plaintiff nonetheless argued for a higher interest rate relying on section 130(2) of **the Courts of Justice Act** which sets out a number of factors which a trial judge can rely upon to depart from the default prejudgment interest rate. The plaintiff argued that since the amendment occurred after the claim was issued, in the interests of fairness, something other than the default rate should apply. Justice Corthorn found that none of the relevant factors entitled the plaintiff to an increased interest rate on the facts of this case and awarded prejudgment interest on the non-pecuniary damages at a rate of **1.3 per cent per year**.

The defendant in **Nemchin** was represented by Borden Ladner Gervais partners Tom Ozere and Kim Dullet.

Upcoming Cases

Throughout Justice Corthorn's reasons she acknowledges that the law with respect to assignment of benefits and interest rates in motor vehicle cases is unsettled. This is a result of two pending assignment appeals in *Cadieux v. Saywall* and *Carroll v. McEwen* which will be heard by a five member panel of the Ontario Court of Appeal in May. Counsel for the plaintiff in *El-Khodry v. Lackie* has also sought leave to appeal to the Supreme Court of Canada, including on the issue of whether the 2015 amendments (including interest rates) apply retrospectively.

We will provide a further alert upon the release of the above decisions

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