

VEDANG VALUATIONS

Litigation Support For Personal Injury And Family Law

Personal Injury Law - Nemchin v. Green, 2021 ONCA 238 (CanLII) – A Brief Analysis

A recent judgment by the Ontario Court of Appeal has finally provided some much needed clarity on the treatment of collateral benefits received by the appellant (also the plaintiff) from a personal injury resulting from a motor vehicle accident. This order was an appeal from the Superior Court of Justice order, dated October 28, 2019, with reasons reported at 2019 ONSC 6243. The appeal was from the trial judge's order requiring the appellant to top up the amount of the LTD benefits that the appellant assigned to the respondent's (also the defendant) insurer pursuant to s. 267.8(12) of the *Insurance Act*, R.S.O. 1990, c. I.8.

The appellant was injured in an Accident in 2010 as a result of which she was unable to work. In a trial in April 2017, the jury awarded the appellant \$540,000 towards her future loss of income claim. However, the nature of the appellant's injuries triggered LTD benefits from Sun Life, her employer's group benefits insurer. Since both the appellant and her employer contributed to the plan, Sun Life deducted and remitted income taxes from its LTD benefit payments to the appellant. In the period from April 2017 to November 2019, the appellant received total after-tax LTD payments of \$104,162.34.

Following the jury's April 2017 verdict, the respondent brought a motion under s. 267.8(12) of the *Insurance Act* to require the appellant to assign to the respondent's insurer from the date of the judgment the plaintiff's rights to the Sun Life benefits. At trial (heard in 2018 and 2019), the judge found that s. 267.8(12)(a) called for the assignment of the gross amount of the Sun Life benefits, and not the net after-tax payments. The trial judge concluded that *the appellant was required to top up the net payments from the date of the judgment that were assigned to the respondent's insurer so that they would equal the gross payments to which the appellant was entitled under the Sun Life plan*. The trial judge also rejected the appellant's submission to obtain an opinion from the CRA on this matter.

The Court of Appeal found that the trial judge misinterpreted ss. 267.8(9), (10), and (12)(a)(ii) of the *Insurance Act* and applied the trust and assignment provisions in a manner contrary to the plain meaning of the legislative text and its purposes while also failing to take into account insurer's withholding and remittance of income tax as a statutory trust and its effect on the appellant's rights under the plan. According to the court of appeal, as indicated in *Bapoo v. Co-Operators General Insurance Co.* (1997), 1997 CanLII 6320 (ONCA):

The modern approach to statutory interpretation calls on courts to interpret a legislative provision in its total context. The court's interpretation should comply with the legislative text, promote the legislative purpose and produce a reasonable and just meaning.

Further, according to the Court of Appeal as observed in *Cadieux v. Cloutier*, 2018 ONCA 903: "Section 267.8 of the *Insurance Act* contains provisions designed to address [the overlap between tort damages and collateral benefits] and to prevent double recovery. It reflects the principle that victims should be fairly compensated, but not over-compensated." The Court of Appeal concluded that the effect of the trial judge's order is to leave the appellant undercompensated and in a worse position than if she had not had collateral benefits from Sun Life – the trial judge's orders imposes a financial burden on the appellant.

For Litigation Accountants what the judgment from the Court of Appeal means that it now provides much needed clarity in terms of how damages are to be calculated - any taxable collateral benefits received have to be presented net of taxes, not the gross amounts.