

**Personal Injury**

## Personal injury appeal clarifies tax treatment for assignment of future benefits, says lawyer

By **John Schofield**

(May 3, 2021, 9:08 AM EDT) -- A recent Ontario Court of Appeal decision in a personal injury case breaks new ground on the taxation of future benefits and confirms that successful plaintiffs should receive full compensation for their injuries, says one of the lawyers involved.

"What this case does is it reminds everybody that there are two principles at play," said Joseph Y. Obagi, a partner with Ottawa-based Connolly Obagi LLP who represented the plaintiff appellant in the case, Tatiana Nemchin. "Yes, we have to make sure there's no over-compensation, but on the other side of the equation, we also have to make sure that the plaintiff receives full compensation.



Joseph Y. Obagi, Connolly Obagi LLP

"And I think it has precedential value," he added, "because there's no case out there that dealt with what do you do with the taxation of future benefits."

In a unanimous, April 16 decision in *Nemchin v. Green* 2021 ONCA 238, the Court of Appeal agreed that Nemchin should not have to reimburse the defendant respondent, Yvonne Green, for tax deducted by the insurer, Sun Life, on Nemchin's long-term disability (LTD) benefits, which were assigned to Green under s. 267.8(12) of Ontario's *Insurance Act*, which is intended to prevent double-recovery in personal injury awards. In reaching its decision, the Appeal Court overturned an October 2019 ruling by Superior Court Justice Sylvia Corthorn ordering Nemchin to make the top-up payments to Green to cover the source deductions.

"The trial judge's interpretation leads to an unfair result," Court of Appeal Justice Lois Roberts wrote for the three-judge panel, which included Justices Gary Trotter and Julie Thorburn. "It imposes a financial burden on the appellant that she would not have incurred if she did not have collateral benefits. This runs counter to the principle of full compensation."

Correctly interpreted, the Appeal Court ruled, s. 267(12)(a)(ii) of the *Insurance Act* means that if the respondent accepts the assignment of the appellant's rights under her LTD insurance plan, then the respondent's insurer is entitled to a credit for the actual payments that the appellant receives under the plan. But that should not be at the appellant's expense, the Court of Appeal determined.

"The respondent's insurer is entitled to take whatever steps are necessary, at its own expense and with the appellant's co-operation, as required under s. 267(12)(b), to deal with the issue of the tax withholdings with Sun Life and the CRA," wrote Justice Roberts.

On Dec. 1, 2010, Nemchin was driving along an Ottawa street when Green, who was attempting to make a left turn, collided with Nemchin's car, explained Obagi. Nemchin's physical and psychological injuries left her unable to work.

In April 2017, a jury found that Green was 90 per cent liable and Nemchin's contributory negligence amounted to 10 per cent. According to facts detailed in the decision, the jury awarded Nemchin \$540,000 in net damages for future loss of income, the head of damage relevant to the appeal.

Nemchin's injuries triggered coverage for long-term disability income continuation benefits from Sun Life, her employer's group benefits insurer. Sun Life deducted and remitted income taxes from those payments and provided Nemchin with an annual T4A tax slip. Between April 2017, when the trial judgment was rendered, to November 2019, when Green's insurer, Aviva, payed out the judgment damages, Sun Life paid Nemchin a net, after-tax LTD amount totalling just over \$104,000.

Following the jury's verdict, Green brought a motion under s. 267.8(12) of the *Insurance Act* to require Nemchin to assign her rights to her Sun Life benefits to Green's insurer from the date of the judgment.

Following the dismissal of Green's appeal of the jury verdict in July 2019, the LTD tax issue went before Justice Corthorn on a motion. She 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. She rejected the appellant's submission that a ruling from the Canada Revenue Agency (CRA) should be obtained first. She ordered Nemchin to reimburse Aviva for the tax deducted from her LTD payments going forward, and that the almost \$125,000 in gross LTD benefits she had already received since the jury's verdict should be subtracted from her \$540,000 income loss award. Nemchin and her counsel appealed.

"We took that position in the Court of Appeal that it's going too far to say not only does the plaintiff lose her benefits, now she has to pay the defendant the taxable amount," Obagi told *The Lawyer's Daily*. "That's taking the pendulum way too far in favour of the insurance company and against the plaintiff because now the plaintiff is starting to lose their recovery.

"So that's the importance of the decision going forward," he added. "This is an issue about the taxation. But it also goes beyond that. It

essentially says that when you're dealing with the *Insurance Act*, while preventing double recovery is a goal, the plaintiff is still entitled to full compensation, and so you cannot eat into the full compensation aspect of our law. And if there's a cost associated with the assignment, all those costs are borne by the party who's taking the assignment so they don't get to have their cake and eat it, too, if you will."

Obagi said the Appeal Court decision draws partially on key Court of Appeal decisions regarding the assignment of benefits and the issue of double-recovery such as *Cadieux v. Cloutier* 2018 ONCA 903, *Carroll v. McEwen* 2018 ONCA 902, and *El-Khodr v. Lackie* 2017 ONCA 716. But while those decisions pertained to previous benefits, he said, *Nemchin v. Green* is the first to address the treatment of future benefits.

When it comes to the assignment of benefits, "the Court of Appeal said, no, the future follows the same methodology as the past — it's net," he said. "So that's a critical finding that no appellate case has yet to determine, and so this is now the leading authority on what do you do with taxable benefits in the future."

The decision is fair, said Obagi, because the defendant doesn't have to take the assignment. But if they do, "this case stands for the proposition that the recipient of the assignment bears the corresponding obligations.

"The Court of Appeal here came very clearly to say, no, no, wait a minute — the cost to fight this battle with the CRA is to be paid by the defendant because they're getting the benefit," he added. "So it's a very clear message that if you take the assignment, you take the responsibilities and the obligations that go along with it."

Adam Kuciej, an associate with Toronto-based Levy & Associates Personal Injury Law and chair of the Ontario Bar Association's insurance law section, called the Court of Appeal decision "extremely practical," but said that the trial judge could not be blamed for her conclusion. The complex nature of the issues involved is borne out by the number of Appeal Court cases on collateral benefits in recent years, he noted.

"I think it highlights to me the language in the Act itself," he told *The Lawyer's Daily*. "It seems straightforward, but it's not. It does have a lot of nuance.

"But I think the big takeaway," he added, "is that you can still manoeuvre by getting evidence with respect to what a claimant's tax liabilities actually are to determine what they actually receive at the end of the day so as not to result in overcompensation."

Stephen G. Ross, a partner with Toronto-based Rogers Partners LLP who served as co-counsel for the respondent Green, did not respond to a request for comment.

*If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at john.schofield@lexisnexis.ca or call 905-415-5891.*