

Will lift cap on damage awards

New ODSP changes may give more flexibility

BY DALE SMITH

For Law Times

Ontario has recently made changes that will lift the cap on damage awards before they will affect the eligibility for Ontario Disability Support Program claims. Lawyers say this can help give more flexibility when negotiating damages that could include structured settlements and allow their clients to keep their benefits.

“Our clients need to know if their settlements will be clawed back by ODSP,” says Stacy Koumarelas, a partner with Neinstein LLP in Toronto. “The second they get a settlement, we need to consider whether or not that will disentitle them to the benefits.”

Koumarelas says that often the decision is to structure if it’s a sizeable settlement, because any income that they would receive from just depositing the funds in a bank would potentially affect their benefits, and that there is an incentive to structure a larger settlement, if only to help the funds last longer.

“Lawyers need to be very aware of the interest that, if it’s a sizeable settlement that’s just deposited into a savings account, that could be detrimental to a client’s ongoing entitlements to ODSP, and structures are certainly a vehicle by which to avoid that pitfall,” says Koumarelas.

The changes came into effect on Aug. 1, lifting the cap from \$100,000 in damages, which would otherwise risk the eligibility for ODSP, unless they were granted an exception.

Future loss of income, accident benefits, income replacement benefits, non-earner benefits and punitive damages are considered exempt under the new rules.

Additionally, on Sept. 1, the cap on liquid assets of \$5,000 for a single person before risking being cut off was increased to \$40,000.

“There are exemptions now that put the client in a much better position in terms of being able to spend their general damages component in a way that best meets their needs as opposed to in strict compliance with any rules about spending



Laurie Tucker says that the changes that will lift the cap on damage awards will have the most effect on people with the most significant injuries.

on non-exempt assets,” says Laurie Tucker, partner with Burn Tucker Lachaine Personal Injury Lawyers in Ottawa.

Tucker says the changes will have the most effect on individuals with the most significant injuries, as they tended to have higher awards, as the low exemptions previously were forcing them to lose their benefits.

Deanna Gilbert, partner with Thomson Rogers Lawyers in Toronto, says ODSP has generally

wanted to know the breakdown of damages and which amounts relate to which headings, but it has not tended to care whether there was a structure in place because there is no provision in legislation to deal with it.

Gilbert says that, under the previous rules, she always tended to be able to get an exemption to the \$100,000 cap, but the new rules will definitely make things easier for lawyers.

“It’s less of a hassle because we don’t have to strategically worry about what amount is being associated with what heading of damages; we don’t have to worry about writing to the director to try to get exemptions and/or to keep our client on claim,” says Gilbert.

“Policy limits [being] what they are, even if you’re getting a certain amount of money, if you’re going to be paying that to an attendant care provider, you might still need the regular ODSP income for your life.”

Structures have been used to turn non-exempt into exempt assets in the past, which may be less of a worry under the new rules. As well, lawyers note that

some claimants need to stay on ODSP not only for the monthly income but for the medical plan associated with it as well.

Because the changes are so recent, lawyers agree there is a lack of precedent or even anecdotal evidence at this point to see how all of the new rules will be interpreted.

“If there’s a client that was on ODSP prior to an accident and continued to be on ODSP after an accident, there needs to be a discussion whether it’s in their best interests to pursue an income loss claim,” says Koumarelas.

“Clients absolutely have to pursue an income loss component if there is one.”

Koumarelas says there is “a learning curve” for lawyers as well as the officers with ODSP. “There’s certainly some confusion as to whether or not funds received with a past non-earner benefit are clawed back or just future benefits,” she says.

“When a case settles, there seems to be an ongoing discussion as to whether or not there is that directive that we must pay them back.”

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