

Can you Have Your Cake and Eat it Too?: The Deductibility of Future Benefits From SEF 44 Claims

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CAN YOU HAVE YOUR CAKE AND EAT IT TOO? : THE DEDUCTIBILITY OF FUTURE BENEFITS FROM SEF 44 CLAIMS

INTRODUCTION

The SEF 44 Family Protection Endorsement is excess insurance in its truest sense. It is meant to provide a "safety net" or "last ditch" coverage for insured persons injured in motor vehicle accidents with underinsured motorists. A claim on an SEF 44 policy is a contractual claim for indemnity, no more and no less, within the limits of the policy. The purpose is not to provide a "windfall" or double recovery to the insured.

This characterization of the policy was behind the courts' decisions, until recently, to deduct from SEF 44 claims, the future benefits that the insured could expect to receive, including future disability benefits, future medical benefits and future WCB benefits. The reasoning in these decisions is exemplified by that of the PEI Appeal Court in *MacNeill v. Cooperators*,¹ and the Nova Scotia Court of Appeal in *Campbell MacIsaac v. Deveaux*.² However, the principles in these cases have recently been called into question by the New Brunswick Court of Appeal in *Economical v. Lapalme*.³ The case certainly raises a question as to which line of reasoning the Courts in Alberta will choose to follow in the future. None of the cases were appealed to the SCC, and therefore all of equal persuasive authority in Alberta.

SEF 44 TERMS

Clause 2 of Alberta's SEF 44 endorsement obligates an insurer to indemnify each eligible claimant for the compensatory damages he or she is legally entitled to recover as compensatory damages from an inadequately insured motorist. It provides:

2. INSURING AGREEMENT

In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.

Clause 4 of the endorsement sets out the formula to quantify the amount payable by the SEF 44 insurer: the aggregate of the amounts actually recovered by the eligible claimant from all sources

¹ *MacNeill v. Cooperators*, 2003 PESCAD 9

² *Campbell MacIsaac v. Deveaux*, 2004 NSCA 87

³ *Economical v. Lapalme*, 2010 NBCA 87

and the amounts that he or she is entitled to recover from specific sources must be deducted from the amount of damages assessed against the inadequately insured motorist. It reads:

4. AMOUNT PAYABLE PER ELIGIBLE CLAIMANT

- a. The amount payable under this endorsement to any eligible claimant shall be ascertained by the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from that amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the insurer be obliged to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
- b. The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:
 - i) The insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;
 - ii) The insurers of any person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;
 - iii) The Société de l'assurance automobile du Québec;
 - iv) An unsatisfied judgment fund or similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;
 - v) The uninsured motorist coverage of a motor vehicle liability policy,
 - vi) Any automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
 - vii) Any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;
 - viii) Any Workers' Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained;
 - ix) Any Family Protection Coverage of a motor vehicle liability policy;

Clause 4 therefore sets out a two-step formula to determine the amount payable under an SEF 44 claim. The first step is to determine the amount of damages that the eligible claimant is legally entitled to recover from an inadequately insured motorist. This would include the deductions found in s. 626.1 of Alberta's Insurance Act, for example, providing that lost income must be calculated on a basis net of tax, EI contributions and CPP contributions. If the original tort action has gone to judgment with the participation of the SEF 44 insurer, this step might be completed during the tort phase of the claim. If the SEF 44 insurer has not had the opportunity to participate in the tort action, then pursuant to s. 5(f) of the endorsement, the insurer is not bound by any findings of liability or quantum by the court.