

# THE LAWYERS WEEKLY

[Wilson: insurer can't collect from claimant without contractual reimbursement right](#)

By David Hutt

July 6, 2007

The New Brunswick Court of Queen's Bench recently reviewed the messy overlap between disability benefits and tort damages for lost income, and had a go at tidying things up. In doing so, it embarked on an interesting and topical analysis of indemnity, subrogation and reimbursement.

In *Wilson v. Great-West Life Assurance Co.*, [2007] N.B.J. No. 92, the plaintiff, Beatrice Wilson, had been badly injured in a motorcycle accident. She started a personal injury action and began collecting long-term disability benefits under a London Life group policy.



Wilson was 50 at the time of her personal injury trial in 1996. The trial judge found that, subject to a small residual working capacity, she was and would remain disabled from performing any employment in future. She was awarded damages for past and future loss of income.

After the trial London Life demanded repayment of past benefits, and Wilson complied.

Eight years later, in 2004, Wilson was still receiving disability benefits and expected to receive them until September of 2011 (her 65th birthday). Great-West Life (London Life's successor) advised her, however, that benefits would instead terminate in April of 2005. She had, according to Great-West, been fully indemnified.

The insurer reasoned that, but for her legal costs in the tort case, Wilson was made whole by the 1996 future income award. Accordingly, once legal costs had been repaid (by monthly disability benefits), her entitlement to continuing disability payments should terminate. She would be fully indemnified.

Wilson went to court seeking a declaration that she was entitled to continuation of benefits.

Her disability policy had no specific provisions for subrogation or set-off of tort damages. Rather, Great-West argued that it was a contract of indemnity giving rise to equitable subrogation. The court had to determine the nature of the disability policy and whether subrogation principles apply to future income damages.

The case falls squarely into the middle of conflicting decisions on the nature of disability insurance and subrogation rights.

A contract of indemnity requires the insurer to pay its insured upon proof of both a triggering event and a resulting loss – for example a house fire and proof of property losses. The claimant is literally indemnified. To the extent the insured's recovery from all sources exceeds 100 per cent of his loss, however, he must account to the insurer for any compensation received from third parties.

A policy is not a contract of indemnity if proof of actual loss is not required. A triggering event results in a fixed payout. In that case the insured does not need to account, and may actually retain both the insurance proceeds and compensation from third parties.

Disability policies have been called "income insurance," but do not usually require proof that the insured has lost income. The insured only needs to prove disability and the formula for determining benefits does the rest. That said, the formula is usually based, at least in part, on the insured's prior income and other benefits. Disability policies are, therefore, problematic.

The Nova Scotia Court of Appeal has held that a disability policy is not a contract of indemnity. Disability benefits are "a fixed amount established by contract prior to the disability and requiring no proof of loss" (*Mutual Life Assurance Co. v. Tucker* (N.S.C.A.) [1993] N.S.J. No. 56). The British Columbia Supreme Court, however, reached the opposite conclusion in *Confederation Life v. Causton* [1988] B.C.J. No. 548.

Ultimately the court in *Wilson* followed the Nova Scotia appellate authority, finding that the policy was not one of indemnity. It also found that the insurer had no right of subrogation, and in fact that subrogation was not even a relevant principle in the case.

Strictly speaking no right of subrogation arises until a claim has first been paid. Further, subrogation usually describes an insurer's right to step into the claimant's shoes and pursue the tort, rather than merely waiting to see the results of the insured's personal injury claim. The court stated that waiting in the weeds may actually amount to renunciation of any subrogation rights.

The court found that Great-West was asserting a reimbursement right, not a right of subrogation. Unlike subrogation, a right to reimbursement permits an insurer to claim for money received from a third party regardless of its own payments. Reimbursement rights arise only by contract, and the Great-West policy contained no such terms. *Wilson* was entitled to have her disability benefits reinstated to age 65.

The lesson for disability insurers: to set-off tort damages for future awards, ensure the policy contains a reimbursement right, and not just subrogation. And for plaintiff's counsel: read the policy. It's probably not a contract of indemnity, so look for express terms permitting subrogation or reimbursement terms before beginning negotiations.

*David Hutt is a partner at Burchell Hayman Parish in Halifax, with a special focus on disability defence and insurance litigation.*