A SUMMARY OF DEDUCTIBILITY OF COLLATERAL BENEFITS

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It is a fundamental principle of recovery in tort that the injured party be compensated for the full amount of his loss, but no more. Damages in tort are designed to be compensatory and not punitive. Double recovery offends the general principle of recovery in tort and therefore is not typically permitted.

In limited circumstances however, the courts have recognized exceptions to the rule against double recovery where the benefits received by the injured party came from a collateral source, independent of any claim against the tortfeasor.

The first exception pertains to charitable gifts. Where public or private support benefits such as welfare or charitable gifts are received by a plaintiff, they will not be deducted from an award for income loss or loss of earning capacity.

A second exception pertains to private insurance payments. Where a plaintiff has received benefits under a private insurance policy, those are not to be deducted from an award for damages.

While there is definitely a trend towards greater deductibility of collateral benefits within the modern jurisprudence (and within the relevant insurance statutes where the collateral benefits that are to be deducted from an award of damages for injuries sustained in a motor vehicle accident are specifically enumerated), the authorities seem to indicate that *at common law*, collateral benefits will be deducted from an award of damages unless the plaintiff can prove:

(i) that the collateral benefit is akin to insurance, or

(ii) that s/he has made a contribution or suffered a loss in exchange for the benefit, or

(iii) that the collateral payor has a right of subrogation.

In her dissent in the seminal trilogy of cases, ***Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee***, [1994] S.C.J. No. 19, 1 S.C.R. 359 (SCC), Madam Justice McLachlin explained the long-standing rule against double recovery and its exceptions this way:

> "**8** The fundamental principle, to repeat, is that a plaintiff is entitled to recover to the full extent of the loss, and no more. However, the law, in limited circumstances, has permitted exceptions to the rule against double recovery.
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> **9** The first exception to the rule against double recovery is the case of charitable gifts. If a plaintiff is injured and his neighbour brings him a basket of groceries or donates to him a sum of money, the law will not deduct the value of the basket from the damages which the negligent defendant must pay nor require that the monetary gift be called into account. This exception reflects the concern of the courts who initiated it that people should not be discouraged from aiding those in misfortune. Arguably, it also reflects the reality that in most cases it would be more trouble than it is worth to require the courts to hear evidence and rule on the value of charitable assistance.
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> **10** A second apparent exception to the rule against double recovery was introduced in 1874 by the English decision of *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1. Mr. Bradburn had purchased a private accident insurance policy. He was injured in an accident. The insurance company paid him £31. Bradburn sued the railway company which had negligently caused the accident. The railway company argued that the £31 that Bradburn had received from the insurance company should be deducted from the damages payable by the railway. The court disagreed. It reasoned (*per* Pigott B., at p. 3) that the plaintiff
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> > does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it." (QL at paras. 8-10)

In ***Khairati v. Prasad***, 2002 BCSC 360, [2002] B.C.J. No. 513 (SC), Coultas J provided the following summary of the principles which apply with respect to the non-deductibility of collateral benefits:

"**307** The issue was revisited by the Supreme Court of Canada … in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. Before the Supreme Court of Canada were three appeals from the British Columbia Court of Appeal in which that Court had followed *Ratych*, [1990] 1 S.C.R. 940, and deducted certain disability benefits paid under a collective bargaining agreement from the plaintiff's damage awards. Cory J. writing for the majority, limited *Ratych* to placing an evidentiary burden upon the plaintiffs to establish they had paid for the provision of disability benefits. In all three appeals, Cory J. found evidence of payment which moved them out of the realm of *Ratych* and placed them within an exception from deduction for private policies of insurance first recognized in *Bradburn v. Great Western Railway Co.* (1874), [1874-80] All E.R. Rep. 195 (Ex. Div.).

308 Since *Ratych* and *Cunningham*, I find the law in terms of deductibility of collateral benefits can be summarized:

1) McLachlin J.'s rule in *Ratych* states that when a plaintiff receives a wage benefit under an agreement from which no direct cost to the plaintiff can be traced the benefit should be deducted, unless the court is satisfied that the employer or fund which paid the wage benefit is entitled to be reimbursed for it on the principle of subrogation.

2) When a plaintiff receives a wage benefit at an actual cost then the benefit should be deducted minus the actual cost (see *Ratych* p. 972). For example, if a plaintiff had to give up sick days in order to receive a benefit then the plaintiff would be compensated for the lost sick days.

3) When a plaintiff receives collateral benefits from an insurance policy in which direct costs can be traced to that plaintiff then such benefits are not deductible. This is the "insurance exception".

4) When a plaintiff receives collateral benefits from a charitable source this is not deductible. This is the "charity exception"." (QL at paras. 307-308)

And more recently, in ***IBM Canada Limited v. Waterman***, 2013 SCC 70, [2013] 3 S.C.R. 985 (SCC), Mr. Justice Cromwell, for a majority of the Supreme Court of Canada, discussed the topic of collateral benefits and their deductibility (albeit in the context of damages for wrongful dismissal) in the following passage:

"**38** … [There are] two well-established situations in which compensating advantages [another term for collateral benefits] are not deducted: charitable gifts and private insurance.

39 The first is the less controversial. **The rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong**: see, e.g., Waddams, at paras. 3.1550-3.1560; Cassels and Adjin-Tettey, at pp. 420-21. Two concerns explain the exception: first, that if these charitable gifts were deducted, "the springs of private charity would be found to be largely, if not entirely, dried up" and, second, that it rarely makes practical sense to spend the time and effort required to take these sorts of gifts into account: *Redpath v. Belfast and County Down Railway* (1947), N.I. 167 (K.B.), at p. 170. See also Ogus, at p. 223; Waddams, at para. 3.1550; Cassels and Adjin-Tettey, at pp. 420-21; *Cunningham*, at p. 370.

40 These explanations of the exception suggest we may take into account the broader incentives created by deducting or not deducting a benefit as well as pragmatic considerations relating to whether the applicable rule is clear, coherent and easy to apply: *Cunningham*, at p. 388, *per* McLachlin J.

41 A second and more controversial exception relates to payments from the plaintiff's private insurance. **The core of the [private insurance] exception is well established: benefits received by a plaintiff through private insurance are not deductible from damage awards. However, both the precise scope and the rationale of the exception have been the subject of judicial and scholarly debate. Its practical importance is limited given the widespread use of subrogation, which avoids the compensating advantage issue altogether. While the exception more typically arises in tort cases, it has also been applied in contract actions, including actions for wrongful dismissal**: *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812. The approach in both areas of law is the same in principle, although the terms of the contract and the dealings between the parties will inform the analysis in contract cases.

42 One area of controversy relates to the sorts of benefits which fall within the private insurance exception. Does it apply to both indemnity and non-indemnity insurance? Does it extend to disability benefits, employment insurance or pensions payable on retirement? The Court has held that the answer to all of these questions is yes, but not, as we shall see, without well-reasoned dissent. In short, the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance." (QL at para. 38-42)(Emphasis added)

Cromwell J continued, highlighting the leading Supreme Court of Canada pronouncements on the issue:

"**45** In *Ratych*, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose negligence was

> responsible for the injuries. For the majority, McLachlin J. wrote that it may well be appropriate not to deduct benefits where the employee can show a contribution equivalent to payment of an insurance premium. In other words, benefits may not be deductible when they come about because the plaintiff has prudently obtained and paid for insurance. However, that was not the case in *Ratych*, making it a different situation than one in which the benefits flow from the employer/employee relationship: pp. 973-74. In *Cunningham*, disability insurance benefits payable under the terms of collective agreements were held not to be deductible because there was evidence that the plaintiffs had paid for these disability plans through reduced wages. The Court's earlier decision in *Ratych* was distinguished on this basis.
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> **46** Finally, in *Sylvester*, non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages otherwise payable. The benefits were intended to be an indemnity for lost wages while the plaintiff was unable to work, the plaintiff had not contributed to acquire the benefit, and policy considerations favoured deduction.
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> **47** The two cases in which the private insurance exception was *not* applied (*Ratych* and *Sylvester*) involved benefits that were intended to be an indemnity for the type of loss that resulted from the defendant's breach and to which the plaintiff had not contributed. Retirement pension benefits, which are not an indemnity for loss of wages resulting from inability to work and to which the employee contributes directly or indirectly, have been held by this Court and others to fall within the private insurance exception: *Guy*; *Gill*; *Chandler v. Ball Packaging Products Canada Ltd*. (1992), 2 C.C.P.B. 101 (Ont. Ct. J. (Gen. Div.)), aff'd (1993), 2 C.C.P.B. 99 (Ont. Ct. J. (Div. Ct.)); *Emery v. Royal Oak Mines Inc.* (1995), 24 O.R. (3d) 302 (Gen. Div.); *Parry*." (QL at paras. 45-47)

Predictably, there have been myriad cases in which the courts have discussed the nature and scope of the foregoing principles as they are applied in various fact patterns concerning all manner of plaintiff and defendant. Generally speaking however, the authorities seem to indicate that at common law, collateral benefits will be deducted unless the plaintiff can prove: (i) that the collateral benefit is akin to insurance, or (ii) that s/he has made a contribution or suffered a loss in exchange for the benefit, or (iii) that the collateral payor has a right of subrogation.

Despite judicial refinements to the scope and manner of application of the collateral benefits rule as it was applied in different scenarios, it became the subject of criticism as it was said to result in overcompensation of injured parties in tort actions. As a result,

allegedly in an attempt to eliminate double recovery in tort awards arising out of claims for damages on account of injuries sustained in motor vehicle accidents, numerous provinces enacted statutory modifications to the common law rule by way of their insurance statutes and regulations.

In Alberta, section 626.1 (now section 570) of the *Insurance Act*, RSA 2000, c. I-3, was introduced in 2004 as part of a package of legislative reforms said to be aimed at reducing automobile insurance premiums by reducing damages awards payable by automobile insurers.

The purpose of section 570 is to put a claimant in the same position after receiving an award (defined in the section as a judgment or settlement in respect of an accident claim) that s/he would have been in financially, had the accident not occurred. (Reference: http://www.mondaq.com/canada/x/298424/Insurance/Insurance+Act+Does+Not+Remove+Employers+Right+Of+Subrogation)

This is accomplished by mandating:

(i) that a claimant's award for loss of income must be reduced by the income tax that individual would normally be obligated to pay on the amount;

(ii) that Canada Pension Plan and Employment Insurance payments are also deductible; and,

(iii) that an award must be reduced by the aggregate of all payments from eight other sources set out in subsection 4. Briefly described those other sources are:

  (a) no fault benefits received by a non-Alberta resident pursuant to their auto insurance policy (or non-resident Section B benefits);

  (b) medical, sickness, and accident benefits not provided under the *Alberta Health Care Insurance Act*, (or the equivalent legislation for a non- resident);

  (c) proceeds under Part 5 of the *Insurance Act*, subpart 6 (or the equivalent out of province legislation);

(d) income continuation or replacement benefits (pursuant to a private disability policy);
(e) benefits under an income replacement plan referred to in section 15.1;
(f) CPP disability pensions (or equivalent legislation for non-Canadians);
(g) out of province benefits paid under legislation equivalent to the *Workers Compensation Act*; and,
(h) any other payments, benefits or compensation received pursuant to the laws of any jurisdiction other than those referred to above in (e), (f), (g).

As well, because payments or benefits received pursuant to a policy of insurance for which the claimant has paid premiums are now deductible under section 570 (this is a shift from the Supreme Court of Canada's position enunciated in ***Cunningham v. Wheeler***, *supra*), subsection (7) stipulates that the court can take into account premiums or other amounts paid by the claimant in respect of the "other" source payments.

While this statutory provision/scheme has been the subject of very little judicial analysis or commentary, presumably, under this provision, the courts may add back into the claimant's award the expense of obtaining the plan or coverage, either in whole or in part.

While the insurance legislation in numerous jurisdictions specifies whether a particular collateral benefit is, or is not, deductible in circumstances in which a plaintiff is seeking damages as the result of injuries sustained in an automobile accident, we have nonetheless sought to extract from the jurisprudence the general approach of the courts to the matter of the deductibility of collateral benefits *at common law*.

This summary suggests that the following collateral benefits are those most frequently considered by the courts in the common law context (ie. when outside of the statutory deduction scheme contemplated in the Alberta *Insurance Act*'s provisions regarding automobile accident claim awards).

(i) <u>Charitable gifts</u>: A charitable donation or gift is generally a non-deductible benefit.

A charitable donation or gift is a non-deductible benefit. The rationales for the exception are that benefactors should not be discouraged and also that it is difficult to value some forms of private charity.

Reference: ***Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee***, [1994] S.C.J. No. 19, 1 SCR 359 (SCC); ***M.B. v. British Columbia,*** [2003] S.C.J. No. 53, [2003] 2 S.C.R. 477 (SCC).

(ii) <u>Private insurance</u>: Private insurance is generally a non-deductible benefit.

Usually, no deduction is made to a damages award where a plaintiff has paid for his/her own personal insurance as tortfeasors should not be allowed to benefit from the plaintiff's foresight and prudence.

Additionally, collateral benefits that are similar to indemnity insurance are not to be deducted, provided the plaintiff offers some evidence of direct or indirect contributions towards those collateral benefits whether made through a collective agreement or contract of employment.

Consequently, employment or disability benefits paid pursuant to a program/policy funded or contributed to by an employee (such as through payroll deductions or by way of wage trade-offs, to receive the benefit from his/her employer) are ***non-deductible***, while such benefits paid pursuant to a program/policy funded or contributed to by the employer (particularly where the payment is comparable to an "income continuation benefit plan" or where paid pursuant to a collective agreement) are ***deductible***.

In addition, no deduction will be made if the employer or insurer has a right of subrogation or the employee has a legal or moral obligation to repay the employer.

Reference: ***Ratych v. Bloomer***, *supra*; ***Cunningham v. Wheeler***, *supra*; ***Bedard (Next Friend of) v. Martyn***, 2009 ABQB 392, 468 AR 296 (QB); aff'd, 2010 ABCA 3, 469 A.R. 322 (CA); ***Howes v. Rousta***, 2002 ABQB 1052, 331 A.R. 68 (QB); additional reasons at 2003 ABQB 132, 15 Alta. L.R. (4th) 276 (QB); ***Norman v. Marshall***, [1997] A.J. No. 1370 (QB); ***Cherwoniak v. Walker***, 1999 ABQB 680, 249 A.R. 74 (QB); aff'd, [2001] ABCA 172, 293 A.R. 198 (CA); ***Smith v. Armstrong***, [1991] A.J. No. 1170, 123 A.R. 285 (QB); ***O'Scolai v. Antrajenda***, 2008 ABQB 257, 447 A.R. 114 (QB).

(iii) <u>Pension Benefits and CPP Disability Payments</u>: Pension benefits and CPP disability payments are non-deductible benefits.

A plaintiff's pension benefits and payments received from the Canada Pension Plan fall within the private insurance exception against double recovery. Thus, a tort defendant is not able to deduct for any pensions received by a claimant either from an employer or the Canada Pension Plan.

Reference: ***Khairati v. Prasad***, 2002 BCSC 360, [2002] B.C.J. No. 513 (SC); ***Guy v. Trizec Equities Ltd.***, [1979] 2 S.C.R. 756 (SCC); ***Canadian Pacific Ltd. v. Gill***, [1973] S.C.R. 654 (SCC); ***Kean v. Porter***, 2008 BCSC 1594, [2008] B.C.J. No. 2245 (SC); ***Fraser v. Hunter Estate***, 2000 NSCA 63, 184 NSR (2d) 217 (CA).

(iv) <u>Employment Insurance</u>: Employment Insurance benefits are non-deductible.

Reference: ***Bracchi v. Roberts***, [1990] B.C.J. No. 2429, 51 B.C.L.R (2d) 257 at 258 (SC); ***Cugliari v. White***, [1998] O.J. No. 1628, 38 O.R. (3d) 641 (CA); ***Jack Cewe Ltd. v. Jorgenson***, [1980] S.C.J. No. 24, 1 S.C.R. 812 (SCC); ***McDonald v. Nguyen***, [1991] A.J. No. 1239 (1991), 3 Alta. L.R. (3d) 27 (QB); ***Daley v. Alexander***, [1998] S.J. No. 250, 9 W.W.R. 494 (QB); aff'd,[1999] S.J. No. 693, [2000] 1 W.W.R. 236 (CA).

(v) <u>Social assistance</u>: Past social assistance payments are deductible.

Past social assistance payments are deductible from a plaintiff's award for loss of earnings. Moreover, there does not appear to be a principled reason to distinguish between social assistance benefits and other forms of publicly funded benefits.

Accordingly, past services and programs that were paid for by the government are likely to be deducted from an award of damages to the injured plaintiff or a third party.

Reference: ***M.B. v. British Columbia***, 2003 SCC 53, [2003] 2 S.C.R. 477 (S.C.C.); ***O'Connor v. Mahabir***, 1999 ABQB 326, 243 A.R. 11 (QB); rev'd on other grounds, 2002 ABCA 13, 293 A.R. 352 (CA); ***Cockerill (Next friend of) v. Willms Transport (1964) Ltd.***, 2001 ABQB 136, 284 A.R. 256 (QB); ***L. (H.) v. Canada***, [2005] S.C.C. 25 (SCC); ***D.G. v. Farooqui***, [2003] A.J. No. 1707 (QB) - which dealt with the deductibility of AISH payments received by the plaintiff.

There is some authority that future social assistance benefits may not be deductible as too unpredictable.

Reference: ***Phillip v. Whitecourt General Hospital***, 2004 ABQB 761, 359 A.R. 259 at paras. 524-526, 580.

(vi) <u>Workers' compensation benefits</u>: Workers' compensation benefits are non-deductible.

According to the ***Canadian Encyclopedic Digest* – Damages**, VI.2.(3)(f) (Collateral Benefits at Common Law), because the workers' compensation legislation in every province provides a right of subrogation in favour of the board, workers' compensation benefits are not deductible. See, for instance, section 22(3) of the Alberta *Workers' Compensation Act*, RSA 2000, c. W-15. (QL at para. HDA-76)

(vii) <u>Settlement Proceeds</u>: Settlement proceeds received by a plaintiff are deductible.

Reference: ***Bedard (Next Friend of) v. Martyn***, 2010 ABCA 3, 469 A.R. 322 (CA); ***Laudon v. Roberts***, 2009 ONCA 383, 308 D.L.R. (4th) 422 (CA); ***Ashcroft v. Dhaliwal***, 2008 BCCA 352, 83 B.C.L.R. (4th) 279 (CA).

(viii) <u>Automobile insurance</u>: Legislation in most provinces requires that Section B automobile insurance benefits be deducted from the award of damages.

Reference: Section 570 of the Alberta *Insurance Act*, RSA 2000, c. I-3

(ix) <u>Director's Fees</u>: Director's fees have been held to be deductible.

Director's fees have been characterized as wages and thus have been deducted.

Reference: ***Guy v. Trizec Equities Ltd.*** (1979), 99 D.L.R. (3d) 243 (SCC).

(x) <u>Funds Paid pursuant to the *Victims of Crimes Act*</u>: Funds paid pursuant to the *Victims of Crime Act* appear to be deductible.

Reference: ***McLellan v. Canada (Attorney General)***, 2005 ABQB 486, 382 A.R. 287 (QB).

For a fuller exposition please see: Ryan A. Murray, Oatley Vigmond, "Collateral Benefits: What is Deductible, What Isn't?" August 22, 2013, online at: http://oatleyvigmond.com/collateral-benefits-what-is-deductible-what-isnt/#.VyPghmM4lPM and Constance I. Taylor, Miller Thomson LLP, "Deducting Government Funded Programs from Damage Awards How Low Can We Go?" March 13, 2006, online at: http://www.millerthomson.com/assets/files/article_attachments/How%20Low%20Can%20We%20Go.pdf

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