Deducting Collateral Benefits From Loss of Income Claims

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I. Introduction

A question that we frequently hear from our colleagues in the insurance industry is: what benefits can we deduct in tort claims seeking damages for loss of income?

Consider the plaintiff who has suffered a disabling injury and is unable to work as a result of either a slip and fall accident or an automobile accident caused by the defendant. The plaintiff receives collateral benefits from third parties to account for his or her loss of income; benefits in the form of insurance payments, sick leave payments, EI sickness benefits and/or CPP disability benefits. Can the defendant deduct these benefits from the loss of income claim made by the plaintiff? This paper will provide an overview of the common law approach to deduction of collateral benefits as well as the specific types of deductions that are permitted in the Atlantic Provinces through legislation.

II. Deducting Collateral Benefits from Loss of Income Claims: The Common Law

The courts have long had difficulty with the issue of when collateral benefits should be taken into account in calculating loss of income claims. The difficulty arose in part due to competing philosophies of tort law: one focused principally on only compensating plaintiffs' *actual* losses, and the other focused on the inherent unfairness of allowing tortfeasors to benefit from a plaintiff who had established collateral benefits plans for his or her own security. These competing philosophies came to a head in the seminal Supreme Court of Canada decisions of *Ratych v Bloomer*, [1990] 1 SCR 940 and *Cunningham v Wheeler*, [1994] 1 SCR 359.

Ratych v Bloomer concerned a plaintiff police officer who was injured in a motor vehicle accident. The plaintiff was unable to work for several months due to his accident related injuries, but during his convalescence he continued to be paid pursuant to the terms of a collective agreement and he did not lose any sick leave credits. He sued the defendant for, among other things, loss of income.

The Supreme Court of Canada had to decide whether the plaintiff could recover damages for loss of income from the defendant where the former had been paid his full salary pursuant to his contract of employment. The Court was divided in its decision, five judges answering in the negative and four answering in the affirmative.

The majority of the Supreme Court of Canada held that the plaintiff was not entitled to recover an award for loss of income as he had failed to prove that he had sustained any such *actual* loss of income in the circumstances of his having received continued payments from his employer pursuant to his employment contract.

Writing for the minority, Justice Cory dissented on the grounds that the sick leave benefits received by the plaintiff had been "paid for" by the plaintiff and his co-employees through a process of collective bargaining and, therefore, were indistinguishable in principle from benefits that he might have received under a private insurance contract. This so-called "insurance exception" to the rule against double recovery had consistently been applied by Canadian courts, including the Supreme Court of Canada in *Gill v Canadian Pacific Railway*, [1973] SCR 654 and *Guy v Trizec Equities Ltd*, [1979] 2 SCR 756.

Justice Cory concluded that it was inequitable and unrealistic to require, as a pre-requisite for non-deductibility, that the plaintiff employee prove he had given something in exchange for obtaining sick leave benefits from his employer. He could not find any reason why, in fairness, the Courts should treat benefits paid pursuant to a collective agreement differently from benefits received under a private insurance contract.

The Supreme Court of Canada had occasion to reconsider the issue in *Cunningham v Wheeler*. In that case, the plaintiff had been injured when he was struck by a car while crossing a road. At the time he was forty-six years old and had been employed by B.C. Rail for twenty-five years. He was hospitalized for nine days and kept off work for almost twenty weeks. During this time, pursuant to provisions of a collective agreement, he collected disability benefits from his employer. No specific deductions had been made to account for these benefits, however it was established that the benefits formed an important aspect of the collective bargaining between

his employer and his union. The plaintiff was not required, under the collective agreement, to repay the weekly disability benefits if he subsequently recovered damages from the defendant.

This time it was Justice Cory writing for the majority four judges of the seven-judge panel. He held that his reasoning in *Ratych, supra,* should apply to the circumstances of this case, and specifically that the exception for the non-deductibility of private insurance proceeds should be expanded such that *any* proof of forbearance or self-denial on the part of the plaintiff (i.e. the Plaintiff providing express or implied consideration for the benefit received) should not permit the defendant to benefit from that forbearance or self-denial. He began by confirming the continuation of the insurance exception to the rule against double recovery.

Justice Cory further considered how subrogation rights factored into the expanded scope of the insurance exception.

> Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits if they are found to be in the nature of insurance. However, if the benefits are not "insurance" then the issue of subrogation will be determinative. If the benefits are not shown to fall within the insurance exception, then they must be deducted from the wage claim that is recovered. However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right.

To summarize, the majority decision in *Cunningham v Wheeler* stands as the leading authority for two propositions:

1. That an exception to the general "rule against double recovery" is the "insurance exception". To qualify, the plaintiff must show that the collateral benefits he received were "in the nature of" an insurance, i.e., some type of consideration must have been given up by the plaintiff in return for the benefit. Any detriment suffered on the part of the plaintiff in acquiring those benefits goes to the advantage of the plaintiff and not the defendant.

2. That if the collateral benefits do not fall within the insurance exception, they must be deducted from the damages recovered *unless* the third party who paid the benefits has a right of subrogation.

The law was summarized more recently in *IBM Canada Limited v. Waterman* (2013) SCC 70. Although this was a case dealing with a claim for wrongful dismissal, and not a tort case, the Supreme Court of Canada discussed the issue of deductibility of collateral benefits. At paragraph 76 of the decision, the Supreme Court summarized the law as follows:

> [76] From this review of the authorities, I reach these conclusions:
>
> (a) There is no single marker to sort which benefits fall within the private insurance exception.
>
> (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
>
> (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
>
> (d) In general, a benefit will not be deducted if it *is not an indemnity* for the loss caused by the breach and the plaintiff *has contributed* in order to obtain entitlement to it.

(e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

III. Deducting Collateral Benefits From Loss of Income Claims: The Legislative Response

The common law principles set out above continue to apply to personal injury claims that arise outside of the automobile context. However, this is not the case in personal injury claims arising from motor vehicle accidents. In an attempt to minimize the ultimate liability of insurers in respect of income loss claims, most of the legislatures in Atlantic Canada, with the exception of Prince Edward Island, have enacted the requirement that loss of income claims arising from automobile accidents are to be reduced by the sum total of collateral benefits where the provider of the benefits retains no right of subrogation. These legislative reforms in Nova Scotia, New Brunswick, and Newfoundland and Labrador were driven by the objective of reducing the cost of insurance for customers.

Prince Edward Island

As noted above, there is no legislation in Prince Edward Island dealing with the assessment of collateral benefits. The common law outlined earlier in this paper remains the law of Prince Edward Island in respect of collateral benefits. The treatment of EI Benefits appears to be an exception. This will be addressed further in this paper.

Newfoundland and Labrador

The legislative response in Newfoundland and Labrador has been Section 26.5 of the *Automobile Insurance Act*, RSNL 1990, c A-22 [the "*Automobile Insurance Act (NL)*"], which reads:

> **26.5** (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for loss of income and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or to which the plaintiff is entitled, under the laws of this province or another jurisdiction, or under an income continuation benefit plan where, under the law or the plan, the provider of the benefit retains no right of subrogation.
>
> (2) Damages shall not be reduced under subsection (1) by a payment that a plaintiff has received or to which a plaintiff is entitled under the *Workplace Health, Safety and Compensation Act*.
>
> [Emphasis added]

Section 26.5 not only applies to loss of income claims but also to "loss of earning capacity" claims. While not clarified in the legislation, it leaves open an argument that deductions are not limited to losses of past income but also to claims of future loss of earning capacity. This remains to be judicially considered.

Section 26.5 has been judicially considered once, by the Supreme Court of Newfoundland and Labrador in *Ryan v Curlew,* 2018 NLSC 71. In that matter, the plaintiff had been involved in a motor vehicle accident and was making a claim with past loss of income and future loss of earning capacity components. The plaintiff was already receiving long term disability benefits and weekly indemnity benefits from her Section B insurer, as well as disability benefits from Canada Pension Plan. The defendant sought to have these amounts deducted from any eventual award.

The Court in *Ryan v Curlew* adopted a broad interpretation of Section 26.5(1) and concluded that the plaintiff's long term disability benefits, Section B weekly indemnity benefits, CPP disability benefits, and residual earnings were deductible from past loss earnings awards.

Nova Scotia

In Nova Scotia, Section 113A of the *Insurance Act*, RSNS 1989, c 231 [the "*Insurance Act (NS)*"] is the applicable provision:

> **113A.** In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit retains no right of subrogation.
>
> [Emphasis added]

The Nova Scotia Court of Appeal considered the interpretation of this section in *Tibbetts v Murphy*, 2017 NSCA 35. The Court of Appeal stated at paragraphs 38 and 39:

> Section 9(5) of the *Interpretation Act*, which I set out earlier, states that every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering certain matters. The occasion and necessity for Bill 1 were those sky-rocketing automobile insurance premiums, and the cost of those premiums was the mischief to be remedied. The objective of Bill 1 was to reduce those premiums, and to reduce damage awards. Eliminating double recovery by "all payments in respect of the incident" as set out in s. 113A would reduce the amount of damages, and those amounts are linked to the cost of insurance premiums.
>
> I agree with the respondents that the Legislature intended to change the collateral benefits rule as part of a wide-reaching statutory scheme to reduce insurance premiums, and that deducting those payments achieves that intent.
>
> [Emphasis added]

The Nova Scotia legislative provision, like its Newfoundland and Labrador counterpart, also allows deductions against "loss of earning capacity" claims. Benefits paid under a disability policy are considered to be deductible under the legislation where there is no common law or contractual right of subrogation.

New Brunswick

In New Brunswick, Section 265.4 of the New Brunswick *Insurance Act*, RSNB 1973, c I-12 [the "*Insurance Act (NB)*"] provides for the deduction of collateral benefits from loss of income claims:

> **265.4**(1) In an action for damages arising out of an accident, the amount recoverable by the plaintiff as damages for loss of income between the date of the accident and the date of the judgment shall, subject to subsection (4), be reduced by
>
> (a) all payments that the plaintiff received for loss of income during that period under an enactment of any jurisdiction or under an income continuation benefit plan,
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> (a.1) all payments that the plaintiff received for loss of earning capacity during that period under a policy of disability insurance, and
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> (b) all payments that the plaintiff received during that period under a sick leave plan arising by reason of the plaintiff's occupation or employment, whether or not the plaintiff's credits under that plan can be characterized as a capital asset.
>
> [Emphasis added]

Unlike the Newfoundland and Labrador and Nova Scotia legislation, the New Brunswick wording expressly restricts the application of deductions to damages for loss of income between the date of the accident and the date of judgment. This means that automobile insurers in New Brunswick are not permitted to deduct collateral benefits against future loss of income (i.e. losses sustained after the date of judgment).

The New Brunswick legislation also differs from that in Newfoundland and Labrador and Nova Scotia with respect to the treatment of subrogated claims. In the past, disability insurers who made loss of income payments to plaintiffs would typically bring a subrogated claim against the defendant/automobile insurer (and/or retain the plaintiff's solicitor to do so). Subsection 265.4(3) of the *Insurance Act (NB)* has brought an end to that practice:

> **265.4**(3) Notwithstanding any enactment or agreement or the terms of any plan or policy of disability insurance, but subject to subsection (4),
>
> (a) a person who makes a payment referred to in subsection (1) is not subrogated to the right of recovery of the plaintiff against another person in respect of that payment, and
>
> (b) a plaintiff who has received a payment referred to in subsection (1) and who subsequently receives an award of damages is not required to reimburse the person who made the payment.

Pursuant to Hill v Graham (2003), 258 NBR (2d) 347 (CA), any person who has made a payment of the type described in Subsection 265.4(1) is no longer entitled to a subrogated right of recovery and the plaintiff is not required to reimburse the person who made the payment as a result of the introduction of Section 265.4.

It should be noted that there is one exception to the "no subrogation rule" discussed above. Subsection 265.4(4) of the *Insurance Act (NB)* permits subrogated claims in situations where a legislated enactment expressly permits the person who made the payments to recover the amount of the payments from the plaintiff or the defendant. For instance, subsection 10(10) of the *Workers' Compensation Act,* RSNB 1973, c W-13 expressly permits the commission to pursue a subrogated claim. As subrogation is expressly permitted under the above mentioned enactment, subsection 265.4(4) excludes the Commission from the "no-subrogation rule".

The New Brunswick Court of Appeal had this to say concerning section 265.4 of the Insurance Act in *Courtney v. Royal and Sun Alliance Insurance Co.,* 2001 NBCA 53 (CanLII) at paragraphs 13 to 38:

> In *Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, 1994 CanLII 120 (SCC), [1994] 1 S.C.R. 359, the Supreme Court of Canada clarified its decision in *Ratych v. Bloomer,* 1990 CanLII 97 (SCC), [1990] 1 S.C.R. 940 and held that employment benefits, if paid for directly or indirectly by the injured employee, were not deductible from any claim for loss of income against the wrongdoer. Were it not for s. 265.4(1) of the Insurance Act, R.S.N.B. 1973, c. I-12 (the "Act"), Mr. Cortney's sick pay would not be deductible from his loss of income claim against any third party. Of course, the enactment of s. 265.4(1) constitutes a watershed event in the evolution of the law respecting the assessment of damages arising out of a motor vehicle accident. It reads as follows: […]
>
> The point of all this is that in an action for damages arising out of a motor vehicle accident, the court is required, both under the common law and s. 265.4(1), to treat sick pay as a collateral benefit, not as a payment that obviates ab initio the plaintiff's loss of income from employment. Of course, a departure from the traditional approach would be warranted in respect of a claim for no-fault weekly disability benefits for loss of income if the wording of Part II so required […]
>
> **Indeed, s. 265.4(1) of the Insurance Act contemplates a process by which the court is required to first compute the income that the injured party would have earned, but for the accident, and then to deduct from that sum specified collateral benefits.**
>
> [Emphasis added]

IV. Deduction of Specific Collateral Benefits

Section B Benefits

Section B benefits which have been paid to the plaintiff can be deducted in each of Prince Edward Island, Newfoundland and Labrador, Nova Scotia, and New Brunswick.

Though most drivers now carry it, Section B is not a mandatory coverage in Newfoundland and Labrador. Section B wage loss benefits are still deducted from the plaintiff's past loss of income, as in the other provinces. The difference is that in Newfoundland and Labrador, a Section B insurer can subrogate against an at-fault driver who does not carry the coverage. While the Supreme Court of Newfoundland and Labrador has yet to rule on the deductibility of Section B benefits against a future loss of income claim, there remains an argument that, if Section B benefits will continue into the future then they should be deducted as well. The court might take an approach similar to that taken in Nova Scotia considering the similarities in both provinces' legislative provisions.

In Nova Scotia, Section B benefits can be deducted against both past loss of income claims and future loss of earning capacity claims. With respect to the deductibility of future loss claims, the court addressed this issue in *Binder v Mardo Construction Ltd* (1994), 129 NSR (2d) 64 (SC). In this case, as the future Section B benefits could not be quantified, a trust was set up to collect the future benefits for the Defendant. The Court stated:

> The philosophy underlying Section "B" or "no fault" benefits is that funds should be available to a party immediately without having to await a future assessment of fault. The payments are imposed upon the insurer by the *Insurance Act* which also clearly provides that the defendant or the defendant's insurer is to receive credit for past payments. Given that the courts, in interpreting the Act, have decided that the legislature intended to prevent double recovery it is, as I have said, reasonable to assume that the principle extends to all payments, not to just those made in the past. The defendant is, therefore, entitled to such a credit. The only fair way in which to give an effect to such an interpretation of the Act is to order, which I shall do, that the plaintiff hold in trust and pay to the defendant all Section "B" benefits hereafter paid to her in relation to the same injury […]

In New Brunswick, it was held in *Brown v Smith,* 2003 NBCA 31 that where the defendant tortfeasor is fully indemnifying the plaintiff for future loss of income, the plaintiff is required to hold future Section B payments to age 65 in trust for the benefit of the defendant (Section A insurer). This approach is commonly referred to as a *Cox v Carter order* and arises from an earlier Ontario decision in *Cox v Carter* (1976), 13 OR (2d) 718 (Ont HCJ).

Workers' Compensation Benefits

Workers' compensation benefits are not deducted from loss of income awards, as provincial workers' compensation legislation across Canada provides a right of subrogation in favour of the corresponding compensation board. In Prince Edward Island, the Workers' Compensation Board may subrogate to the plaintiff's right of action and bring an action in the name of the worker or in its own name for all or part of the worker's outstanding claim (s. 11(3) of the *Workers' Compensation Act*, RSPEI 1988, c W-7.1).

In Newfoundland and Labrador, Section 45(8) of the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c W-11 sets out the right of subrogation:

> **Where action allowed**
>
> **45.** (8) Where the worker or the worker's dependents apply to the commission claiming compensation under this Act, neither the making of the application nor the payment of compensation under it shall restrict or impair a right of action against the party liable, but in

> relation to those claims the commission is subrogated to the rights of the worker or his or her dependents and may maintain an action in his or her or their names or in the name of the commission against the person against whom the action lies for the whole or an outstanding part of the claim of the worker or his or her dependents
>
> [Emphasis Added]

The same outcome is expressly referenced in Section 26.5(2) of the *Automobile Insurance Act (NL)*, which states that "damages shall not be reduced under subsection (1) by a payment that a plaintiff has received or to which a plaintiff is entitled under the *Workplace Health, Safety and Compensation Act*."

In Nova Scotia, the *Insurance Act (NS)* does not expressly reference the right of subrogation in favour of workers' compensation benefits. However, it is clear from the *Workers' Compensation Act*, SNS 1994, c 10, Section 30, that the Workers' Compensation Board retains a right of subrogation with respect to any compensation received by a plaintiff.

In New Brunswick, payments received by a plaintiff pursuant to the *Workers' Compensation Act* are not deductible. The Commission is entitled to commence a subrogated claim against the defendant to recover payments made to the plaintiff resulting from a motor vehicle accident, (see Sections 10 and 11 of *Workers' Compensation Act*, RSNB 1973, c W-13).

CPP Disability Benefits

CPP disability benefits are available under the federal *Canada Pension Plan*, RSC 1985, c C-8.

In *Ryan v Curlew, supra,* the Supreme Court of Newfoundland and Labrador confirmed that, in the context of damages arising from motor vehicle accidents, CPP disability benefits are deductible from awards for past loss of income, pursuant to Section 26.5 of the *Automobile Insurance Act (NL)*. The Court did not address whether future CPP disability benefits may be deducted.

The Court of Appeal of Newfoundland and Labrador considered the deductibility of CPP disability benefits post – *Cuningham v. Wheeler* in a non-automobile tort claim in the case of *Briffett v. Gander & Disctrict Hospital Board,* 137 Nfld. &P.E.I.R. 271. The Court of Appeal concluded that CPP benefits should not be deducted from loss of income awards since they fall into the expanded insurance exception to the rule against double recovery.

In Nova Scotia, there has been considerable debate and uncertainty over the past 10 years regarding whether CPP disability benefits are deductible from past and future income loss claims arising from motor vehicle accidents. The most recent decision on this issue is *Holland v Sparks*, 2018 NSSC 136. The question before the court in this case was whether the deductions from income loss and earning capacity permitted by Section 113A of the *Insurance Act (NS)* include CPP disability benefits received by or available to a plaintiff after the trial of the action.

The Court in *Holland* referred to the Nova Scotia Court of Appeal's 2017 decision in *Tibbetts, supra*, which ruled that CPP disability benefits were deductible from injury claims through Section 113A, even though CPP disability benefits were not deductible at common law. The Court in *Holland*, however, noted that *Tibbetts* did not deal with the issue of whether CPP disability benefits received or available after trial were deductible from an award for lost future earnings or diminished future earning capacity. The Court considered the wording of Section 113A and found that deductions from damages for income loss and loss of earning capacity required by Section 113A do not include future CPP disability benefits to be received or available to the plaintiff after trial.

The courts in New Brunswick have held that Subsection 265.4(1) does not include CPP disability benefits, and that such benefits are not deductible by a defendant/insurer in the context of a Section A automobile claim, (see *Richard v Arseneault*, 2002 NBQB 94, *Harris v Sterniczuk,* 2004 NBQB 26, and *Blythe v Crowther*, 2004 NBQB 68).

EI Sick Benefits

Although there is support for the proposition that Employment Insurance sick benefits may not be deductible from income loss claims under the common law, the Prince Edward Island Supreme Court decision in *Boertien v Carter* (1995), 135 Nfld & PEIR 91 (PEISC) permitted the deduction of Employment Insurance benefits. In holding that the benefits received by the plaintiff, who was a seasonal worker, were deductible in a personal injury damage claim, the Court held that Employment Insurance should be considered an exception to the *Cunningham v Wheeler* analysis. While the decision was followed by the Prince Edward Island Supreme court in *MacTavish v PEI*, 2009 PESC 32, it was distinguished by the BC Supreme Court in 2002 where the Plaintiff was not a seasonal worker. Where the decision operates as a common law exception to the common law rule established by the Supreme Court of Canada, its value as a precedent may be considered tenuous.

In Newfoundland and Labrador, Nova Scotia, and New Brunswick, EI benefits paid to a plaintiff after an automobile accident may be deducted by a defendant pursuant to Section 26.5 of the *Automobile Insurance Act,* Section 113A of the *Insurance Act (NS)* and Subsection 265.4(1)(a) of the *Insurance Act (NB).*

Social Assistance Benefits

Social assistance benefits are also considered to be a form of income replacement. In *MB v British Columbia*, 2003 SCC 53, the Supreme Court of Canada considered whether such benefits should be deducted from a plaintiff's loss of income award at common law. Chief Justice McLachlin, writing for the majority, considered whether, in the first instance, social assistance was a form of income replacement. She wrote:

> It is argued that social assistance is not a form of income replacement, because it is given on the basis of need for the purpose of relieving poverty.
>
> In my view, this argument is mistaken. It is true that social assistance benefits are intended to relieve poverty, and that need is the relevant criterion. However, as Smith J.A. pointed out in his dissenting judgment in the Court of Appeal in the case at bar, this does not mean that they are not intended as wage replacement. On the contrary, it suggests that they are intended to replace that part of employment income that would normally be spent on meeting basic needs (para. 162). Most people who require welfare require it because they lack sufficient income to meet their basic needs, and the normal source of sufficient income is employment of one sort or another. Social assistance therefore replaces income that most people would have obtained through employment. It does not purport to replace all of the income they would have obtained if they had a job. It only replaces enough to satisfy basic needs. But it is no less "wage replacement", simply because it only replaces a portion of the income a person might otherwise have had.
>
> …
>
> I conclude that nothing has been put forward to displace the common sense proposition that social assistance benefits are a form of wage replacement. It follows that the only way in which they can be non-deductible at common law is if they fit within the charitable benefits exception, or if this Court carves out a new exception. Otherwise, retention of them would amount to double recovery.
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> [Emphasis added]

Chief Justice McLachlin further held that carving out a new policy-based exception for social assistance was unjustifiable. Given that social assistance benefits come out of public funds, and given that taxpayers contribute to these funds in the belief that they will be used for legitimate purposes such as relieving genuine need, McLachlin C.J. considered it unfair to taxpayers to allow certain plaintiffs to recover from these funds and then receive a duplicative payment from a tort award.

Law professor S.M. Waddams of the University of Toronto commented of the deductibility of social assistance benefits following *MB v British Columbia* (in his *The Law of Damages*, Looseleaf Edition (Aurora: Canada Law Book, November 2010), at para. 3.1650) as follows:

> It remains open to the legislatures to provide, if thought desirable, by subrogation, assignment, trust, undertaking, or equivalent device, for repayment to the government where a wrongdoer is liable. In that way neither would the wrongdoer gain by the claimant's receipt of welfare benefits, nor would the claimant be over-compensated. The same effect may be achieved, it would seem, by an administrative requirement that the welfare recipient acknowledge an obligation to repay. The English Court of Appeal commented in *Crofton v. National Health Service Litigation Authority*, that there was "no good policy reason why damages which are about to be awarded specifically for the provision of care to the claimant, needed only as a result of the tort, should be reduced, thereby shifting the burden from the tortfeasor to the public purse".

Newfoundland and Labrador's *Income and Employment Support Act*, SNL 2002, c I-0.1 (the "*IES Act*") provides for the repayment of "overpayments" of income support, being payments which the recipient received to meet an immediate need, but which the recipient agreed in writing to repay at a future date. Overpayments are considered debts due by a recipient to the Crown pursuant to Section 24 of the *IES Act*. Given the obligation imposed to repay them, social assistance payments made pursuant to the *IES Act* would not be deductible from loss of income claims by operation of Section 26.5 of the *Automobile Insurance Act (NL)* in circumstances where the plaintiff has entered into a written agreement for repayment of the social assistance benefits as an "overpayment".

Similarly in Nova Scotia, Section 14 of the *Employment Support and Income Assistance Act*, SNS 2000, c 27, provides for the repayment of any overpayments of income support. On this basis, it is unlikely that social assistance benefits would be deductible under s. 113A of the *Insurance Act (NS)*. The same likely applies in Prince Edward Island where the loss of income portion of an insurance settlement or award may trigger a reassessment of the plaintiff's financial resources and result in calculation of an overpayment, which can then be recovered from the plaintiff by the Director pursuant to the *Social Assistance Act*, RSPEI 1988, c S-4.3.

In New Brunswick, a defendant is not entitled to deduct social assistance benefits paid to a plaintiff after a motor vehicle accident. There is also no right of subrogation to recover such payments from the defendant. That said, the plaintiff is required to repay the Province of New Brunswick for any overpayment arising from the settlement or payment of an insurance claim [see Sections 10 and 12 of *Family Income Security Act*, RSNB 1973, c F-2.01)].

Sick Leave

Sick leave benefits may be deducted from loss of income claims in certain circumstances. Depending on the nature of the sick leave plan, situations may exist to allow the defendant to argue that there is no forebearance or self-denial on the part of the Plaintiff so as to preclude deductibility. For example, in *Kolonel v Kenny* (1992), 98 Nfld & PEIR 1, the Supreme Court of Newfoundland and Labrador permitted sick leave benefits to be deducted where sick leave could not be accumulated or "banked", or where claims against sick leave did not reduce any existing or potential future entitlement either to leave or compensation for unused leave.

Loss associated with use of sick leave only occurs in practice where it is not available upon the occurrence of a future event - illness or disability due to its previous use. If there is a limit to the use of sick leave annually without any ability to carry it forward in future years, or it is subject to a "cap" and the leave used can be replenished to reach the "cap", arguably no loss occurs. There is also no relevant forbearance or self-denial on the part of the plaintiff to another benefit that would preclude the defendant from being able to deduct the use of sick leave from income loss. The opportunities to do so may be limited, but there always should be an inquiry into the nature of a plaintiff's sick leave plan before accepting such a claim.

With respect to claims arising from automobile accidents, there are no specific decisions from Newfoundland and Labrador, Nova Scotia, or New Brunswick on whether sick leave benefits are deductible from income loss

claims pursuant to the legislation in each of those provinces. In Newfoundland and Labrador, the Court in *Ryan v Curlew, supra*, adopted a broad interpretation of Section 26.5(1) of the *Automobile Insurance Act (NL)*, which suggests that sick leave benefits may be deductible from loss of income claims in automobile cases in that Province. Given the similarities in wording between Section 26.5(1) of the *Automobile Insurance Act (NL)* and Section 113A of the *Insurance Act (NS)*, a similar approach could be taken in Nova Scotia.

In New Brunswick, the *Insurance Act (NB)* differentiates between an "income continuation benefit plan" and a "sick leave plan" by referencing each of them in separate subparagraphs of Section 265.4(1); by including them both in the same listing, it signals that the New Brunswick Legislature intended that they should have separate meanings and that one should be to the exclusion of the other. In addition, the *Insurance Act (NB)* ties the deductibility of "income continuation benefit plan" payments to the concept of subrogation by virtue of Section 265.4(4), it does not do so with respect to "sick leave plan" payments.

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