

COLLATERAL BENEFITS:

State of the Law and Proposals for Reform

Michael E. Royce
Perry Hancock

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN

SYNOPSIS

This paper considers the state of the law on the deductibility from a plaintiff's claim for damages for personal injury of benefits received by the plaintiff from other sources subsequent to the plaintiff's injury which compensate the plaintiff in whole or in part for the loss for which the defendant is liable. It reviews the significant decisions of the Supreme Court of Canada on this issue, and sets out the treatment of some of the more common collateral benefits. It concludes with proposals for reform of the treatment of collateral benefits to provide greater certainty in this area and to increase the frequency of their deduction.

Among the more vexing questions in assessing damages in any personal injury action is the determination of appropriate deductions from the plaintiff's claim to account for benefits received by the plaintiff from other sources subsequent to the plaintiff's injury which compensate the plaintiff in whole or in part for the loss for which the defendant is liable. As Professor Waddams has noted, the courts have had considerable difficulty with determining when, if ever, these benefits, in money or services, should be taken into account in assessing the damages payable by the defendant.¹ There is a tension between the views that giving credit to the defendant bestows an undeserved benefit on a wrongdoer and that not giving credit compensates the plaintiff twice over.² This tension has been reflected in the leading cases decided by the Supreme Court considering the deductibility of collateral benefits. These cases will be reviewed in some detail below.

Ratyck v. Bloomer

In *Ratyck v. Bloomer*³, the Supreme Court held by a 5-4 margin that a police officer injured in a motor vehicle accident was not entitled to claim payment of lost wages from the driver of the other vehicle where the officer had received his full salary during the time he had missed work as a result of his injuries. McLachlin J. (as she then was) for a majority of the court started her analysis by restating the fundamental principle of tort law that an injured person

¹ S.M. Waddams, *The Law of Damages*, looseleaf ed. (Toronto: Canada Law Book, 1999) ("Waddams") at ¶3.1490.

² Waddams at ¶3.1490.

³ (1990), 69 D.L.R. (4th) 25 (S.C.C.).

should be compensated for the full amount of his or her loss, but no more.⁴ The plaintiff is to be given damages for the full measure of his or her loss as best as can be calculated, but is not entitled to turn an injury into a windfall⁵. McLachlin J. emphasized that the modern trend in the law of damages is to move away from a punitive approach which emphasizes the wrong the tortfeasor has committed:

The link between the moral culpability of the tortfeasor and his obligation to pay damages to the person he injures is frequently tenuous in our technological and mechanical era. A moment's inattention is all that is required to trigger astronomical damages. The risks inherent in such activities as the use of our highways by motorists are increasingly recognized as a general social burden. In this context, the maxim that compensation must be fair to both the plaintiff and the defendant seems eminently reasonable: *Phillips v. South Western Railway Co.* (1879), 4 Q.B.D. 406 (C.A.). That fairness is best achieved by avoiding both undercompensation and overcompensation.

The trend away from a moralistic view of tort suggests that the process of assessing damages should focus not on how the tortfeasor may be appropriately punished, but rather on what the injured person requires to restore him to his pre-accident state. To focus on the alleged "benefit" to the tortfeasor resulting from bringing collateral payments into account is to misconstrue the essential goal of the tort system. The law of tort is intended to restore the injured person to the position he enjoyed prior to the injury, rather than to punish the tortfeasor whose only wrong may have been a moment of inadvertence.⁶

She concluded that the general principles underlying our system of tort suggest that damages awarded to the plaintiff should be confined to his or her actual loss, as closely as that can be

⁴ At 39.

⁵ At 40.

⁶ At 40-41.

calculated. Where pecuniary damages are at stake, the measure of damages is normally the plaintiff's actual financial loss; unless the plaintiff can demonstrate such loss, he or she is not entitled to recover.⁷

McLachlin J. continued her analysis by reviewing the treatment of collateral benefits in a variety of jurisdictions including the United Kingdom. In England, she observed, the award of damages has long rested on the compensatory principle that a plaintiff can recover only what he or she has actually lost and that there should not be double recovery, but there are exceptions to this general principle.⁸ One exception, which, as will be seen, was notable in the view of Cory J. for the minority in *Ratych v. Bloomer*, was established in *Bradburn v. Great Western Railway Co.*, [1974-80] All E.R. Rep. 195 (Ex. Div.). In that case, it was held that damages for personal injury should not be reduced by amounts payable to the plaintiff by a private insurer. McLachlin J. noted that, although this case was for some time treated as a case of general application and used to support the non-deductibility of all types of benefits, later cases held that some benefits, like wages or sick-benefits paid during the period the plaintiff is unable to work, are to be brought into account in calculating the plaintiff's damages.⁹

McLachlin J. also considered the history of deductibility of collateral benefits under Canadian law, observing that many Canadian cases, "under the influence of *Bradburn*" took a general non-deductibility approach to all types of collateral benefits.¹⁰ She noted that, over time,

⁷ At 41.

⁸ At 41.

⁹ At 41, 43.

¹⁰ At 44.

some courts did deduct certain benefits such as salary continuation payments and sickness and accident insurance payments, but the practice was not universal.¹¹ Indeed, in Ontario, by 1973, the Ontario Court of Appeal in *Boarelli v. Flannigan*, [1973] 3 O.R. 69 adopted a broad non-deductibility approach, as did British Columbia, while in New Brunswick, deductibility was favoured.¹²

Throughout her reasons for decision, McLachlin J. aimed to support deductibility of, on the facts of that case, sick-leave benefits, as consistent with the fundamental principle of assessment of damages to ensure that a plaintiff receive full and fair, but not double, compensation. When confronted with an exception to the general rule such as the private insurance exception in *Bradburn*, she acknowledged it, but explicitly left open the scope and application of that exception for another case.¹³ She also supported her views in favour of deductibility by reference to economic considerations such as the positive effects of distribution of loss among third party benefit providers.¹⁴

By contrast, Cory J., for the minority, while stating his agreement with much of McLachlin J.'s reasons, preferred to decide the case by applying the private insurance exception to deductibility set out in *Bradburn*, the validity of which, he noted, had not been challenged by

¹¹ At 44.

¹² At 44-45, 46.

¹³ At 46-47, 54.

¹⁴ At 48-50.

the appellant.¹⁵ Cory J. reviewed the history of the treatment of the *Bradburn* rule, observing that, by the middle of the 20th century, the result was justified by the argument that the tortfeasor should not benefit from the plaintiff's foresight.¹⁶ He concluded that the principle that the funds that a plaintiff recovers under an insurance policy, for which he or she has paid the premiums, are not deductible is firmly established and based on "fairness and justice".¹⁷ Such a conclusion is clearly rooted in the idea that a tortfeasor who is entitled to set off insurance proceeds received by the plaintiff under a private policy of insurance deprives the plaintiff of all benefit of the premiums paid by the plaintiff and appropriates the benefit to himself or herself.¹⁸

Having accepted the continued validity of the *Bradburn* exception, Cory J. turned to an analysis of whether sick-leave benefits provided under a collective agreement could be equated with those under a contract of insurance. He concluded that the provision of such benefits is part of the package of wages and benefits arrived at through the give and take of bargaining.¹⁹ He found that it would be inequitable and unrealistic to require, as a prerequisite for non-deductibility, that the plaintiff prove that he or she has given something in exchange for obtaining sick-leave benefits from his or her employer.²⁰

¹⁵ At 27.

¹⁶ At 28-29.

¹⁷ At 30.

¹⁸ See *Shearman v. Folland*, [1950] 1 All E.R. 976 at 978 (C.A.), quoted by Cory J. at 29.

¹⁹ At 33-34.

²⁰ At 34.

Cory J.'s acceptance at the *Bradburn* exception, and his effort to analogize the receipt of sick-leave benefits to the receipt of proceeds under a private policy of insurance, suggests that he valued the avoidance of an undeserved benefit to a defendant over the consequence of double recovery to a plaintiff. McLachlin J., while acknowledging the existence of the *Bradburn* exception, was able to avoid its application by finding that neither a loss nor a contribution equivalent to payment of an insurance policy had been established in the instant case. The problem, however, was not simply a matter of evidentiary considerations for McLachlin J. She stated:

Approaching the problem from a substantive point of view, it may be that there is a valid distinction between cases where a person has prudently obtained and paid for personal insurance and cases where the benefits flow from the employer/employee relationship. The law has long recognized that in the first situation an exception should be made to the usual rule against double recovery. The existence of such an exception does not mean it should be extended to situations where personal prudence and deprivation are not demonstrated. In the latter case there is little to be weighed in the balance against the general policy of the law against double compensation.²¹

In view of the analysis in her reasons as a whole, it appeared that McLachlin J. was prepared to consider at an appropriate time the underpinnings of the *Bradburn* rule. She clearly placed the principle of ensuring fair, but not over-, compensation ahead of the consideration of avoiding undeserved benefits to a defendant.

In the wake of *Ratych v. Bloomer*, it might have been expected that the trend would have been toward the primacy of the principle that an injured person should be compensated for the

²¹ At 47-48.

full amount of his or her loss and no more, a recognition that permitting double recovery is exceptional and a rejection of the view that a wrongdoer ought not to have the benefit of protection against loss available, either by statute or by arrangements he or she made, to the plaintiff.²² James Flaherty, counsel for the successful appellant in *Ratych v. Bloomer* and now the Ontario Attorney-General, wrote an article after the Supreme Court's decision in that case in which he asserted that a broad deductibility rule for collateral benefits was now required which conformed with the principles affirmed by the court.²³ He regarded McLachlin J.'s reasons in that case as requiring all indemnity payments (that is, those payments intended to compensate the insured in whole or in part for a pecuniary loss) to be taken into account.²⁴ Although McLachlin J. was not required to address the continued applicability of the *Bradburn* exception in *Ratych v. Bloomer*, she signalled that the exception was one that remained open for consideration in another case and commentators, including counsel for the appellant in that case, might have expected an expanded deductibility rule when the matter next came before the Supreme Court. That, however, was not to be.

Cunningham v. Wheeler

In *Cunningham v. Wheeler*²⁵, the Supreme Court considered three appeals in actions for damages for personal injury in which arose the question of the deductibility of disability benefits

²² See H. David, "Case Comment: An Update on Collateral Benefits: *Ratych v. Bloomer*" (1992) 14 Advocates Q. 221 at 222.

²³ J.M. Flaherty, "A Purposeful Uniform Collateral Benefits Rule" (1992) 3 C.I.L.R. 1 ("Flaherty") at 3.

²⁴ At 6-7.

²⁵ (1994), 113 D.L.R. (4th) 1 (S.C.C.).

received by a plaintiff from a claim for lost wages. McLachlin J., as she had in *Ratych v Bloomer*, emphasized that the fundamental principle in assessing damages for personal injury is that the plaintiff is entitled to a sum of damages which will return him or her to the position he or she would have been in had the accident not occurred in so far as money is capable of doing this.²⁶ At the same time, she reiterated that compensation must be fair to both the plaintiff and the defendant; the ideal of the law is fully restorative but non-punitive damages. Double recovery, she emphasized, is not permitted.²⁷

By stating these principles, McLachlin J. noted, she did not differ with Cory J., writing again on this issue as in *Ratych v. Bloomer*. Their disagreement arose over the scope of the private insurance exception set out in *Bradburn*. While McLachlin J. might have been expected to have rejected the *Bradburn* exception, she preferred instead to state that it ought to be maintained, although she construed it in such a way to limit it severely.

In particular, McLachlin J. construed *Bradburn* only as applying to non-indemnity insurance policies under which insurance money is paid not to indemnify the plaintiff for a pecuniary loss, but simply as a matter of contract on a contingency. In such a case, the plaintiff has not been compensated for any loss and may claim his or her entire loss from the negligent defendant without violating the rule against double recovery.²⁸ She stated that, subject to the exceptions of charity and non-indemnifying personal insurance or pensions, the rule in other

²⁶ At 24.

²⁷ At 25.

²⁸ At 27.

common law jurisdictions remains one of deductibility. She characterized the court's decision in *Ratyck v. Bloomer* as joining the "general trend in the common law world to deduction of collateral benefits".²⁹ Unfortunately for those in favour of a broader rule requiring deductibility of collateral benefits, McLachlin J. was no longer in the majority on this issue.

Unlike in *Ratyck v. Bloomer*, in which he was a *minority* of 4, in *Cunningham v. Wheeler*, Cory J. was now in a *majority* of 4. If his views on the importance of avoiding transferring benefits from the sacrificing plaintiff to the undeserved defendant merely informed his reasons in *Ratyck v. Bloomer*, they were made explicit in *Cunningham v. Wheeler*. Cory J., after describing the issue as whether the insurance exception set out in *Bradburn* ought to be maintained, forcefully reiterated the existence of the exception in the following terms:

I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly, it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.

Recovery in tort is dependent on the plaintiff establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the defendant, the tortfeasor. I can see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Tort recovery is based on some wrongdoing. It makes little sense for a

²⁹ At 30.

wrongdoer to benefit from the private act of forethought and sacrifice of the plaintiff.

There is a good reason why the courts should be slow to change a carefully considered long-standing policy that no deductions should be made for insurance moneys paid for lost wages. If any action is to be taken, it should be by legislatures. It is significant that in general no such action has been taken.³⁰

Cory J. limited the majority decision in *Ratyck v. Bloomer* by construing it as merely placing an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits.³¹ He then listed types of evidence that might be sufficient to establish that the employee paid for the benefit.³² He concluded that, in all three cases, the disability benefits were in the nature of private policies of insurance and there was evidence that they had been acquired through trade-offs in the collective bargaining process. Accordingly, he held that there should be no deduction of the amounts received as disability benefits from the awards for lost wages.³³

From McLachlin J.'s response, it is clear that she did not intend her reasons in *Ratyck v. Bloomer* to be as narrowly cast as suggested by Cory J. In her dissenting reasons, McLachlin J. argued that *Ratyck v. Bloomer* was not merely a ruling on evidentiary sufficiency, but pronounced on the general requirement for deduction of employment wage benefits from claims for loss of wages against a tortfeasor.³⁴ McLachlin J. set out five policy arguments supporting her position in favour of deductibility:

³⁰ At 10.

³¹ At 14.

³² At 15.

³³ At 16, 18, 21.

³⁴ At 31.

- *Substitute loss argument:* In response to the argument that it would be unjust to deprive plaintiffs of the benefits that, through prudence and thrift, they have provided for themselves, McLachlin J. replied that, as a matter of logic, the fact that a plaintiff may lose the benefit of having made a contribution does not affect the fact that, to the extent a loss is made good by the plan, the plaintiff in fact suffers no parallel loss recoverable against the defendant under tort principles. The law reflects this logic in that it has consistently refused to compensate a plaintiff because he or she took precautions which minimized the loss flowing from the negligent act.³⁵
- *Deterrence argument:* In response to the argument that wage benefits paid under employment plans should not be deducted from damages for lost earnings claimed from tortfeasors because requiring the tortfeasor to pay more will increase the deterrent effect of the tort actions and reduce the incidence of negligent conduct, McLachlin J. stated that it is far from clear that the difference between the damages payable without deduction of collateral benefits received from employment plans and damages payable with deduction would have any effect on negligent conduct. Moreover, even if some connection between non-deduction of employment benefits from damage awards and deterring negligent conduct could be established, deterrence alone is not a valid basis upon which to justify increasing damages.³⁶

³⁵ At 33.

³⁶ At 35.

- *Tortfeasor should bear the loss argument*: This argument, McLachlin J. stated, rests on the assumption that there is a loss which someone must pay. Since a plaintiff who has been compensated for lost earnings by an employment benefits plan has suffered no loss to the extent of those benefits, it is not a question of who will bear the loss. Nor is this a case of the tortfeasor unjustly benefiting at the plaintiff's expense. The plaintiff contributes regardless of whether or not the accident occurs, and the tortfeasor does not benefit, in any usual sense of the word, since he or she pays the actual measure of the plaintiff's loss. The fallacy behind the argument that the tortfeasor should bear the loss is the notion that the tortfeasor should be punished, an approach our law has eschewed except for special circumstances in which punitive damages may be awarded.³⁷
- *Social inequity argument*: In response to the argument that deduction of wage benefits would create unfair and artificial barriers between top management and professionals who can afford to purchase their own insurance and those who make the same provision and make relatively greater financial sacrifices to provide for disability payments through collective bargaining, McLachlin J. observed that the point was not argued in the case and was not supported by the record. In any event, if the *Bradburn* exception is confined to non-indemnity insurance or true pensions, there is no difference in treatment of privately purchased or other wage loss protection. Any indemnity must be taken into account. Moreover, it is by no means clear that employees either cannot afford to

³⁷ At 35-36.

purchase private insurance or make relatively greater financial sacrifices to obtain their employment plans than would those able to purchase insurance privately. It is not just "top management and professionals" who purchase insurance privately, and it is not true that all employees are in inferior financial positions.³⁸

- *Subrogation*: McLachlin J. argued it makes sense for the tortfeasor to pay damages for wage losses already indemnified by others only if the employer or insurer who pays the wage benefit recovers the damages allocated to lost wages from the employee by way of subrogation. In such a case, there is no double recovery. The burden is properly placed on the tortfeasor rather than the employee or insurance company. Since rights of subrogation appear to be exercised rarely, the best approach is a regime of deductibility of employment plan benefits, subject to the plaintiff's right to claim the benefits if it is established that they will be paid over to the subrogated third party.³⁹

In her powerful rejoinder to Cory J.'s majority view, McLachlin J. also considered the need for a coherent, consistent rule which can be applied with certainty. She stated:

Each year, thousands of cases similar to those at bar arise. Failing a negotiated settlement, they fall to be decided in our courts. Lack of certainty as to when a deduction for a benefit should be made adds to the complexity of settlement negotiations and increases the number of cases which must be litigated. This in turn adds to the

³⁸ At 36.

³⁹ At 37. Cory J. had stated that, in general, subrogation has no relevance in a consideration of the deductibility of disability benefits if they are found to be in the nature of insurance. If, however, the benefits are not insurance, then the issue of subrogation will be determinative. Non-insurance benefits must be deducted unless the third party has a right of subrogation regardless of whether or not the right is exercised. Cory J. did suggest that different considerations might apply where the third party has formally released its subrogation right (at 21).

burden on the courts, delays resolution of the plaintiff's suit, and increases the cost to the general public. The desirability of a coherent, consistent rule which can be applied with certainty favours adhering as closely as possible to the fundamental principle of restorative, compensatory damages for actual loss suffered.⁴⁰

In response to Cory J.'s enumerated evidentiary considerations which may be sufficient to bring a plan with the insurance exception, she observed:

However helpful these may be, the very number of the considerations and the vagueness of their parameters underscores the difficulty of determining whether there has been a sufficient contribution to bring the case within the insurance exception.⁴¹

McLachlin J. rejected the solution of introducing a deeming provision that all employment benefit plans are paid for by the employee and concluded that indemnity plans ought to be brought into account:

One solution to this uncertainty might be to introduce a deeming provision or a presumption that all employment benefit plans are paid for by the employee. But this poses problems of its own. How is *Ratyck v. Bloomer*, which arguably involved a type of employment benefit scheme, to be distinguished? More fundamentally, what power has a court of review to replace the fact-finding task of the judge with presumptions or deeming provisions? The essential question -- whether the employee has contributed to the premium bringing the benefit within the *Bradburn* principle -- is one which would seem to lie squarely within the domain of the trial judge to decide on the evidence. But so long as this is so, the problem of uncertainty remains. The history of judicial attempts to deal with collateral benefits belies the suggestion that it is easy to decide when they should or should

⁴⁰ At 38.

⁴¹ At 38.

not be brought into account in a negligence action.

The better approach, in my view, is that adopted in England and other jurisdictions: to confine the *Bradburn* exception to the facts upon which it was enunciated. The proceeds of non-indemnity insurance would not be brought into account in assessing damages for negligence. Employment benefit plans, on the other hand, designed to indemnify the plaintiff for the inability to work, would be deductible from claims for lost earning capacity unless the plaintiff establishes that he or she is bringing the claim on behalf of a subrogated third party.⁴²

In view of the fact that McLachlin J.'s reasons were in dissent in *Cunningham v. Wheeler*, it may be suggested that it is inappropriate to review them in such detail since they do not reflect the majority position. It is submitted, however, that McLachlin J.'s reasons follow more closely to the spirit of *Ratyck v. Bloomer* and point the way to a resolution of the problem of deductibility of collateral benefits, if not by the courts then by the legislature.⁴³

Treatment of various collateral benefits

As a result of the "U-turn in result"⁴⁴ achieved by Cory J. in *Cunningham v. Wheeler*, the law of collateral benefits remains unsettled, and provides for double recovery in a number of instances. The present state of the law on deductibility of various benefits will now be reviewed briefly below:

⁴² At 39.

⁴³ Even Cory J. in *Ratyck v. Bloomer* acknowledged that McLachlin J.'s reasons in that case highlighted the need for broad and creative legislative solutions that will promote values of compensation and efficient cost-sharing in fields such as motor vehicle accident law. He, however, preferred to leave the task of reform to the legislatures as in the United States where the collateral benefits rule has remained relatively untouched by the courts but has been widely revised or abolished by state legislatures (at 36).

⁴⁴ See H. David, "Collateral Benefits Revisited: *Cunningham v. Wheeler*" (1995), 17 *Advocates Q.* 254 at 255.

- *Gifts*: As Professor Waddams states, all cases agree that private, charitable or benevolent gifts are not to be deducted from a claim for damages.⁴⁵ In formulating her analysis in *Cunningham v. Wheeler*, McLachlin J. accepted as a longstanding exception to the rule against double recovery the case of charitable gifts, premised both on the concern that people should not be discouraged from aiding these in misfortune, and, arguably, on 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.⁴⁶
- *Insurance benefits*: As a result of the continued viability of the *Bradburn* principle, private insurance benefits are not deductible from a plaintiff's damages.⁴⁷
- *Employment benefits*: As is apparent from the discussion of *Ratyck v. Bloomer* and *Cunningham v. Wheeler*, there has been much dispute over the deductibility of employment benefits such as sick-leave payments and disability benefits. If *Cunningham v. Wheeler* is taken as the most recent word on this point,⁴⁸ then employment benefits will not be deductible if paid for by the employee directly or indirectly. Canada Pension Plan disability benefits also have been held to fall within the exception to the rule against

⁴⁵ Waddams at ¶3.1550. See also J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) ("Fleming") at 276.

⁴⁶ At 25.

⁴⁷ *Cunningham v. Wheeler* at 10; Waddams at ¶3.1590; Fleming at 276.

⁴⁸ If it is accepted as the prevailing rule, Waddams observes it may be said that *Ratyck v. Bloomer*, though not technically overruled, is very substantially limited in effect: at ¶3.1635.

double recovery on the basis that they are akin to a private policy of insurance for which the plaintiff has paid through contributing to the Plan.⁴⁹

- *Welfare benefits*: The prevailing view in Canada is that welfare benefits are treated as gratuitous and not deductible from the plaintiff's damages.⁵⁰
- *Free or substituted provisions of services*: This issue, usually considered under the topic of collateral benefits, relates to whether a plaintiff can recover from the tortfeasor the value of services provided to the plaintiff for free or at a subsidy. In general, a plaintiff cannot recover damages for such services where the plaintiff is under no obligation to pay or recover on behalf of the service provider.⁵¹ Where there is evidence that the plaintiff might cease to be eligible for free services or might move to a jurisdiction where benefits are less generous, however, these possibilities should be taken into account.⁵²
- *Employment insurance*: In general, employment insurance benefits are not deductible from an award of damages.⁵³

⁴⁹ *Cugliari v. White* (1998), 38 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. refused (1998), 40 O.R. (3d) xvii.

⁵⁰ *Boarelli v. Flannigan* at 73-74; Waddams at ¶3.1650.

⁵¹ *Wipfli v. Britten* (1984), 13 D.L.R. (4th) 169 at 191-192 (B.C.C.A.), leave to appeal to S.C.C. granted (1985), 13 D.L.R. (4th) 169n (S.C.C.); *Tronrud v. French* (1991), 84 D.L.R. (4th) 275 at 280-282 (Man. C.A.), leave to appeal to S.C.C. refused (1992), 87 D.L.R. (4th) vii (S.C.C.); Waddams at ¶3.1690; 8 C.E.D. (Ont. 3rd), Title 42, §332.

⁵² Waddams at ¶3.1690; 8 C.E.D. (Ont. 3rd), Title 42, §332; *McLeod v. Palardy* (1981), 124 D.L.R. (3d) 506 at 526-527 (Man. C.A.).

⁵³ *Jorgensen v. Jack Cewe Ltd.* (1980), 111 D.L.R. (3d) 577 at 581 (S.C.C.) (unemployment insurance benefits not deducted from damages for wrongful dismissal); Waddams at ¶3.1720.

- *Workers' compensation*: As workers' compensation legislation generally provides a right of subrogation in favour of the board, benefits paid to a worker are not deductible.⁵⁴
- *Health insurance*: Similarly, as the Ontario *Health Insurance Act*⁵⁵ provides a right of subrogation to the Plan, benefits are not deductible, even, it appears, where the Plan waives its right of subrogation.⁵⁶

Proposals for reform

The need for reform in the area of deductibility of collateral benefits has been apparent for many years. McLachlin J. reviewed in her dissenting reasons in *Cunningham v. Wheeler* the "wealth of research and comment on the question of whether wage benefits and the like should be deducted from damage awards for the same losses...[v]irtually all of [which] favours deduction".⁵⁷ Osborne J. (as he then was) in his *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*⁵⁸ stated that a rule premised upon non-deductibility is "wasteful in practice and cannot be justified in principle. It ought to be changed".⁵⁹ McLachlin J. noted that

⁵⁴ *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A, s. 30(10)-(13); Waddams at ¶3.1730; 8 C.E.D. (Ont. 3rd), Title 42, §330.

⁵⁵ R.S.O. 1990, c. H.6, s. 30.

⁵⁶ 8 C.E.D. (Ont. 3rd), Title 42, §326; Waddams at ¶3.1740; *Stein v. Sandwich (Township)* (1995), 77 O.A.C. 40 at 49-50 (C.A.).

⁵⁷ At 39-40.

⁵⁸ Vol. 1 (Toronto: Ministry of the Attorney General, 1988) ("*Osborne Report*").

⁵⁹ *Osborne Report*, at 438 (quoted by McLachlin J. in *Cunningham v. Wheeler* at 40).

Osborne J. recommended that the collateral benefits rule be abolished, by statute if necessary, and that collateral benefits in the nature of indemnity payments be deducted from the relevant components of an award of damages in tort.⁶⁰

McLachlin J. also referred to recommendations of the Ontario Law Reform Commission in its *Report on Compensation for Personal Injuries and Death*⁶¹ which recommended that collateral benefits be taken into account with respect to a damage award for a pecuniary loss. She noted that its proposal required that all indemnity payments, including *ex gratia* payments, be assessed, with the amount of those payments being set aside from the damage award and held in trust for the collateral source.⁶² Finally, she referred to various academic commentators, including Flaherty, who had favoured a rule of deductibility.⁶³

Despite these suggestions for reform, the collateral benefits question has remained unresolved. Aside from the treatment of such benefits in the context of automobile insurance (where deductibility is the general rule),⁶⁴ no legislative steps have been taken to address the uncertainties and inconsistencies in the law, although there continues to be discussion about the need for reform. A recent report by the Law Commission in England, for example, suggested

⁶⁰ At 40.

⁶¹ (Toronto: Ministry of the Attorney General, 1987).

⁶² At 40.

⁶³ At 40.

⁶⁴ See, for a recent analysis, S.E. Firestone, "Deductibility of Collateral Benefits under Ontario's Three Automobile Insurance Schemes" (1998) 21 *Advocates' Q.* 1.

that the present law on collateral benefits in that country may be regarded as internally inconsistent in three respects:

- (1) There is a tension in the collateral benefits cases as to whether the measure of damages to be applied is purely compensatory or has a punitive element.
- (2) Some of the specific collateral benefits rules are inconsistent with one another....
- (3) It is inconsistent that indemnity insurers have a right of subrogation in respect of the insured's tort claim, [while] non-indemnity insurers do not. One of the reasons for this conclusion is that policies are often categorised as indemnity or not on the basis of tradition. Accordingly, for example, life and personal accident insurance policies are not seen as indemnity insurance and yet they may indemnify the insured for a specific loss.⁶⁵

In view of the majority decision in *Cunningham v. Wheeler*, it is clear that any reform of the collateral benefits rule must be taken by the legislature. Perhaps the most obvious reform is to prescribe a primary rule with two corollaries as suggested by Flaherty:

- All benefits in the nature of indemnity payments, regardless of source, are to be taken into account and deducted in the assessment of compensation to the plaintiff for pecuniary loss in tort.

⁶⁵ The Law Commission, *Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits* (1999) Law Com. No. 262 at 127. Despite these observations, however, the Law Commission found insufficient support for any of six proposed options which ranged from radical reform of the law in favour of deductibility to not changing it at all, and therefore recommended no change at this time. It expressed the hope, however, that its report would assist with the continued development of the common law and would assist the Government if it should wish to give further consideration to legislative reform of the law in this area (at 139).

- A payor of benefits to the plaintiff in the nature of indemnity payments who has an existing right to repayment by reason of stature, subrogation, assignment or by an independent cause of action is entitled to recover from the defendant where the payor exercises its right.
- Where the plaintiff has received indemnity payments and where the payor either has no right to recover or fails to exercise its right to recover, then the payments are to be deducted in the assessment of compensation to the plaintiff for pecuniary loss.⁶⁶

This rule and its corollaries have the benefit of simplicity, and, at a minimum, eliminate the *Bradburn* exception as it is applied to indemnity insurance. To the extent that they recognize the right of third party payors to recover payments directly from a tortfeasor, they avoid the possibility of double recovery for the plaintiff. With respect to particular types of claims, it may be appropriate to modify the rule to eliminate rights of recovery by certain third party payors such as OHIP.

Reform in this area has been necessary for many years and has been recognized as such. What is now needed is the will to carry out this reform.

⁶⁶ Flaherty at 3-4.