



**DEDUCTING CONTRACTUAL EMPLOYMENT BENEFITS FROM
PAST INCOME LOSS AWARDS**

By Chelsea Lott
Carfra & Lawton

6th Floor
395 Waterfront Crescent
Victoria, British Columbia
Canada V8T 5K7
<http://www.carlaw.ca>

Chelsea Lott
Tel: 250 381 7188
clott@carlaw.ca

<http://www.rmc-agr.com>

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Introduction

The fundamental goal of tort law is to restore the plaintiff to the position that he would have been in if not for the defendant's wrongdoing. This is the reason why plaintiffs in personal injury actions cannot recover lost wages resulting from their injuries where they have been paid those wages pursuant to a contract of employment. Failure to deduct these benefits would amount to double compensation or a windfall to the plaintiff. The general principle is that payments made by an employer during the period when a plaintiff could not work due to injuries caused by a negligent defendant should be accounted for in assessing damages for loss of earnings. There are limited exceptions to the rule against double recovery, but the reality is that the exception has become the rule. It is very easy for a plaintiff to prove that employment benefits should not be deducted from tort awards, and the result is that plaintiffs often receive a windfall from personal injury claims.

The Rule Against Double Recovery

In [*Ratyck v. Bloomer*](#), [1990] 1 S.C.R. 940, a police officer's wages were paid by his employer while he was unable to work due to the negligence of the defendant. The wages paid in this circumstance were deducted from the total damage award in a 5-4 split decision of the Supreme Court of Canada. The court said the plaintiff was not permitted to recover his lost wages twice.

Madam Justice McLachlin wrote the majority opinion and confirmed the following principles underlie our system of tort law at pages 24 – 25:

...

It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more. ...

[T]he purpose of awarding damages in tort is to put the injured person in the same position as he or she would have been in had the tort not been committed, in so far as money can do so. The plaintiff is to be given damages for the full measure of his loss as best that can be calculated. But he is not entitled to turn an injury into a windfall. In each case the task of the Court is to determine as nearly as possible the plaintiff's actual loss. ...

... The award is justified, not because it is appropriate to punish the defendant or enrich the plaintiff, but because it will serve the purpose or function of restoring the plaintiff as nearly as possible to his pre-accident state....

A plaintiff is to be compensated for his actual loss, no more and no less. There are limited exceptions to this principle, the main one being the insurance exception. In *Ratych*, the court confirmed that benefits in the nature of insurance proceeds are not deductible from a plaintiff's damages. The plaintiff has paid for the insurance and should not be deprived of the benefits for which he contracted. A number of cases followed *Ratych* and deducted benefits from damages where the plaintiff did not show that he or she had paid for the benefits through a loss or contribution and so were not within the insurance exception.

[*Cunningham v. Wheeler*](#), [1994] 1 S.C.R. 359, is the leading case on the rule against double recovery and was decided shortly after *Ratych*. It was a 4-3 decision of the Supreme Court of Canada which expanded the insurance exception to cases where a plaintiff received replacement income while off work due to injuries and could demonstrate a loss or a contribution equivalent to payment of an insurance premium. Mr. Justice Cory, writing for the majority, summarized his opinion as follows:

...

In *Ratych v. Bloomer*, there was no evidence put forward that the plaintiff had paid for the disability benefits. What type of proof will be required to show that the benefits are in the nature of insurance? It is my opinion that was required by the *Ratych* decision is that there be evidence adduced of some type of

consideration given up by the employee in return for the benefit period. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage reflected in a collective bargaining agreement, will be sufficient.

Generally speaking, any of the following examples, by no means an exhaustive list, provide the sort of evidence that could well be sufficient to establish that the employee paid for the benefit:

- (1) Evidence that there were trade-offs in the collective bargaining process, which demonstrate that the employee has foregone higher wages or other benefits in return for the disability benefits. In such a case, the employee has paid for the benefits through wages foregone.
- (2) Evidence of some money foregone by the employee in return for the benefits. For example if the employees gave up the return of a percentage of their unemployment insurance plan premiums in return for the benefits.
- (3) Evidence of a direct contribution by the employee, in a form such as payroll deductions, in return for the benefits. Such a contribution need not be 100% of the premium.
- (4) Evidence of payments made by the employer for the benefits made on behalf of the employee which shows that these payments were part of the employee's wages, and thus the employee provided work for the employer in order to have the premium paid. For example, if the employer's contribution is listed on the employee's pay slip or statement of benefits, it can reasonably be inferred that the contribution is part of the employee's wage package.

The majority of the court established that where there is some consideration by the employee/plaintiff for the replacement income, then those wages paid by the employer are not deductible from damages awarded for lost income. A plaintiff who has given consideration for disability benefits can recover the amount claimed twice, once from the disability plan and once from the defendant tortfeasor.

Mr. Justice Cory further reasoned that limiting the insurance exception to private insurance was manifestly unfair. It would mean that top management and professionals would benefit from the exception because they could purchase private insurance whereas employees who made sacrifices to provide for disability payments through their collective bargaining agreement would be denied the benefits of the insurance exception. Employees should not be disentitled to the insurance exception because of the mode of payment for the disability benefits. In his view, the effect of *Ratych* was to place the evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits.

Madam Justice McLachlin, writing the dissenting opinion, criticized Mr. Justice Cory's expansion of the insurance exception and would limit the insurance exception to non-indemnity insurance or pensions.

The British Columbia Court of Appeal considered the state of the rule against double recovery following *Cunningham* in [Kask v. Tam](#), (1996), 21 B.C.L.R. (3d) 11. There, the plaintiff and his brother owned and operated a business. While off of work due to injuries from a motor vehicle accident, the plaintiff continued to receive a salary from the company. The evidence of the brother was that normally their employees do not get paid while off of work and that the plaintiff had agreed to pay the wages back once he received his settlement from the insurer. The court considered the income to be a 'gratuitous payment' and that the defendant could not have the benefit of the employer's generosity so the wage replacement was non-deductible.

Mr. Justice Donald held that *Ratych* survived to the extent that some evidence that wage loss benefits were paid for by the plaintiff is required but that *Cunningham* greatly lightened the burden. In the court's opinion at ¶24:

...

There will be few cases where the tortfeasor can escape paying compensation to an employee for lost time at work when the absence was covered by the employer or its insurer. Either the employer was obliged by contract to pay or to provide insurance coverage, in which case it can be easily shown that the benefit formed part of the overall compensation package, or the employer was under no obligation but continued the salary *ex gratia*, in which case the law says that the tortfeasor cannot take the benefit of another's generosity.

The Current State of the Law

The effect of *Cunningham* has been that it is relatively easy for plaintiffs to show that they have paid consideration for wage-loss benefits. The evidentiary requirement is low and some evidence of negotiation to give up something for the insurance coverage is sufficient.

A recent example is [*Druet v. Sandman*](#), 2011 BCSC 232. The plaintiff drew on her 'sick bank' for some income replacement. She testified that such coverage was part of her workplace benefits package and that she paid tax on the benefits. Had she not used the sick bank she would have lost income. This was held to be sufficient evidence to bring the money within the private insurance exception, so the court awarded her the equivalent as part of the past wage loss award.

Some courts are willing to take judicial notice of labour relations concessions in order to justify use of the private insurance exception to the rule against double recovery. In [*Howes v. Rousta*](#), 2002 ABQB 1052, for example, wage loss benefits paid pursuant to a collective agreement were deemed to be within the insurance exception, without any evidence the plaintiff paid or gave consideration for the benefits. Mr. Justice Marceau opined that there is always a *quid pro quo* in the process of negotiations and took judicial notice that, "in the collective bargaining process all benefits have a cost to the employee" (at ¶85).

The private insurance exception can apply even where someone other than the plaintiff paid or gave consideration for the employment benefit package. If extended health benefits are received

under a spouse's plan and there is at least some evidence before the court that the spouse paid for the plan or gave up salary in exchange for it, the exception applies: [Napoleone v. Sharma](#), 2008 BCSC 1746 at ¶9. Ironically, the result was in fact a victory for the defence because the plaintiff tendered no evidence about how the spouse's benefit package was negotiated, so the court permitted deduction of the benefits received.

In [Graham v. Lee](#), 2004 BCSC 1287, the plaintiff received medical benefits from his employer's plan. Smith J. applied the principles from *Ratych* and held that the plaintiff's benefits from his employer's plan were deductible from a past income loss award. The court affirmed that the burden is on the plaintiff to show that income replacement benefits were paid for in some manner by the plaintiff or that he is obliged to re-pay them. The plaintiff's evidence about the medical benefits from his employer's plan was unclear and therefore he had not met the evidentiary burden and so were therefore deductible from a past income loss award.

In [O'Scolai v. Antrajenda](#), 2008 ABQB 257, the court deducted special damages paid pursuant to the benefit plan of a plaintiff's spouse. The plaintiff's spouse was entitled to an extended benefit plan because of his position as executive officer with a company. The plaintiff did not provide any evidence that her husband paid for the benefits in any way. The court was not satisfied that any of the medical expenses were received by him as taxable benefits or that the premiums were deducted from his salary. He therefore had not paid for the benefits and the defendant could deduct the special damages paid pursuant to the benefit plan.

Looking Forward

Cunningham has opened the floodgates to the type of past income loss or special damage claims that fall within the private insurance exception to the rule against double recovery. Madam Justice Southin made the following comments criticizing the current law in [Zacharias v. Leys](#), 2005 BCCA 560 at ¶40 and 41:

...

The other aspect of this litigation I find troubling is the size of the award. Because the respondent worked for an employer which had an excellent disability insurance scheme, the respondent is in fact obtaining a windfall. There is nothing, of course, that the learned judge or this Court can do about that. The attempt of McLachlin J., as she then was, in *Ratyck* to bring reason and common sense to this area of the law did not long survive....

So far as I know, the Supreme Court of Canada has never revisited the issues there addressed and the Legislature of British Columbia appears not to think this injustice worth bothering about.

It would be useful to have judicial clarity brought to the question of what the evidentiary requirements are that *someone* paid for or gave up *something* in exchange for the right to receive collateral benefits. The *Ratyck* and *Cunningham* courts were closely split – 5-4 and 4-3 respectively – and the composition of the Supreme Court of Canada has completely changed since *Cunningham*; Chief Justice McLachlin is the only remaining jurist from those courts. The issue is an important one and arises frequently in personal injury cases. The courts have been inconsistent in what they accept as evidence that a plaintiff paid for disability benefits, in some cases requiring no evidence at all. With the right case, perhaps our highest court will revisit the issue to clarify the “conceptual quagmire” of this area of the law as the British Columbia Court of Appeal described it in *Kask*.