

THE INTERPLAY BETWEEN
LONG-TERM DISABILITY BENEFITS

-and-

- The Canada Pension Plan Disability (CPP)
- The Workplace Safety and Insurance Board Benefits (WSIB)
- Severance Awards
- Statutory Accident Benefits (Automobile) (SABS)
- Employment Insurance (EI)
- Social Assistance (Welfare)
- Ontario Disability Support Program (ODSP)



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The interplay between Long-Term Disability, the Canada Pension Plan, Workplace Safety and Insurance Board, Employment Insurance, Statutory Accident Benefits, and other sources of funds for claimants, is a vast and complicated topic.¹ The law is anything but settled in these areas, and the manner in which the interplay works out in a given case can depend on many factors, including (and by no means an exhaustive list):

- The nature of the LTD policy/plan/contract (Private, Group, ASO)
- Self-Insured (Employer or Trust Fund) vs. Insured Plans
- Characterization of the payments (income vs. damages, etc.)
- Probability of recovery of the collateral source (different tests for different classes of benefits)
- Causation – applicable in the Tort, SABS and WSIB context but usually not a factor in LTD matters.

This interplay between these various systems is usually dealt with under the “Offset” or “Co-ordination of Benefits” provisions in most group LTD policies. It would be impossible to cover the wide variety of such provisions that exist under the numerous contracts or benefit plans that exist.

The clear purpose and intent of these provisions is to reduce or eliminate, wherever possible, the amount that the LTD plan will be required to pay out. This is all

¹ The focus of the discussion is on *Ontario* law, however, many of the cases cross provincial lines, and the principles are largely similar between one province and the next.

done in the name of avoiding double recovery, and more importantly, to keep the cost of such plans to a minimum for insurers and their policyholders.

In order to cast the reduction as widely as possible, insurers continue to expand the criteria for co-ordination, however, wider provisions tend to lead to greater ambiguity, and the Latin maxim known as the *contra preferentum*² is alive and well in Canada. When you couple *contra preferentum* with the reasonable expectations of the parties, the wording of any such clauses designed to reduce the quantum of the benefit had better be crystal clear, or they will fail, as specific examples noted below will demonstrate. The learned words of former Supreme Court of Canada, Justice Estey are instructive in that regard:

Even apart from the doctrine of *Contra Preferentum* as it may be applied in the construction of contracts, *the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties* . Similarly, an interpretation that defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. (Emphasis added.)³

² *Contra preferentum*: If the words in a contract are ambiguous the contract should be interpreted against the one who wrote the words.

³ *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) , at 901-902, 112 D.L.R. (3d) 49, at 58-59.

Canada Pension Plan Disability Benefits (“CPP”)

Under Group LTD policies, the vast majority permit the deduction of disability benefits received under the Canada Pension Plan. Some group policies also suggest that an estimated amount of CPP benefits will be deducted regardless of whether the benefits are being received or have even been applied for, however, in my experience, most insurers do not execute a deduction of an estimated CPP benefit. I suspect that the reason for this is that insurers do not want to give claimants a further tool to argue bad faith. An estimated deduction would undoubtedly create economic hardship while a CPP application is pending, and strengthens the claimant’s argument for bad faith damages in the event the claim becomes a litigated matter.

Canada Pension Plan disability benefits are payable to the claimant as contributor, who will have had to contribute into the plan for at least 4 out of the 6 years prior to becoming disabled. This formula affects the Minimum Qualifying Period, which translates into a date that a claimant must prove disability by in order to qualify. The amount of the benefit is determined by the amount of contributions made by the claimant during their working life. At present, the minimum CPP benefit for someone who qualifies in 2006 is \$397.61 and the maximum is \$1,031.05, and a dependent child would be entitled to a monthly benefit in the amount of \$200.47.⁴

The significance of the dependent child portion of the CPP Disability Benefit, is that insurers have on occasion attempted to deduction that amount as well. The Alberta

⁴ <http://www.richrotstein.com/infoart/statistics.html#>

case of *Hennig v. Clarica*⁵ was a case in which the insurer attempted to deduct the CPP benefits of the claimant as well as the amounts received by her four dependent children. The insurer applied both the co-ordination provision as well as the all-source maximum provision in the policy with the result that monthly LTD benefits would have been reduced to \$9.38. The Alberta Court of Appeal upheld the lower court's finding that the monies paid out on behalf of the dependent children was beneficially owned by the children, on whose behalf the benefits were paid. In essence, the claimant was receiving those funds in trust for her children, and was not receiving them on her own account. Accordingly, the claimant was not in receipt of income to the extent of the children's portion and therefore those amounts could not be factored into the co-ordination of benefits or all source maximum calculations.

The case of *Dubasoff v. Mutual Life Assurance Co. of Canada*⁶ further illustrates our courts reluctance to deduct amounts that are earmarked for dependents. Benefits under the Canada Pension Plan could not be construed as income or benefits payable to the insured within the intention of the plan. *London (City) v. London Civic Employees, Local 107*⁷ is to the same effect, where the Arbitrator stated as follows:

“In my view, the CPP child benefit does not fall within the ambit of “all income sources participated in by the employer and employee”. The contextual background for construing the foregoing phrase is that the CPP child benefit is law is considered to be the income of the child. Given its' nature, there must be a sufficiently clear expression of intention by the parties to include the CPP child benefit in the offsets provision, as these monies do not in law belong to the grievor.... I find the extrinsic evidence which I have not reproduced to be unhelpful as an aid in interpretation. In that regard, the extrinsic evidence did not objectively establish a mutual

⁵ 2003 A.B.C.A. 70, 35 C.C.P.B. 55, 45 C.C.L.I. (3d) 68, 10 Alta. L.R. (4th) 15, 320 A.R. [2003] I.L.R. 4180, 288 W.A.C. 387.

⁶ [1995] 6 W.W.R. 279, 28 C.C.L.I. (2d) 141, 7 C.C.P.B. 105, 23 D.L.R. (4th) 577, 128 Sask. R. 303, 85 W.A.C. 303, C.E.B. & P.G.R. 8229.

⁷ [2006] L.V.I. 3602-6.

consensus, as demonstrated by the parties' actions. Consequently, the extrinsic evidence does not provide more insight into how the parties intended to treat the CPP dependent benefit than the offsets language otherwise provides."⁸

While it appears that in most cases the dependents' portion of CPP benefits will not be a proper deduction, the case of *Sunworthy Wallcoverings v. C.E.P., Local 304*⁹, is an example of an Arbitrator permitting the deduction of the most of the CPP benefits being received by the claimant. The group plan in question indicated that LTD could be reduced by other income, which was defined to include CPP benefits that either the claimant or any dependent of a claimant was entitled to. In this case, the claimant's eldest child who was over 18 was actually receiving CPP benefits directly, while the balance of the CPP benefits for the claimant and her minor dependent children was being received by the claimant. It is not clear whether the cases noted above were brought to the attention of the Arbitrator, however, this decision appears to directly contradict the findings in the Court decisions already discussed.

Another contentious issue, which arises in the context of the interplay between CPP and LTD, is the tax treatment of the two payments. The potential for dispute arises when the LTD benefits are being paid pursuant to a policy that provides for non-taxable benefits. CPP disability benefits are taxable in the hands of the claimant. This creates a situation where the claimant is being penalized for having pursued and obtained CPP

⁸ Supra, paragraph 5.

⁹ [\(1999\), 23 C.C.P.B. 61, 1998 CarswellOnt 5843, 80 L.A.C. \(4th\) 28](#) (Ont. Arb. Bd.) [Ontario]

benefits. The case of *Bapoo v. Co-operators General Insurance Co.*¹⁰ should be given close consideration. This case arises in the context of the difference in treatment between Statutory Accident Benefits under the applicable motor vehicle no-fault benefits in effect at the time in Ontario, which were non-taxable in the hands of the claimant. This is a case where a No-Fault automobile insurer was attempting to deduct the full payment of long-term disability benefits notwithstanding the different tax treatment. The Ontario Court of Appeal's decision focused particularly on the purpose of the no-fault legislation whose purpose was to ensure that a plaintiff would not be overcompensated. The purpose of the offset provisions in LTD policies is also to eliminate overcompensation, or double recovery, as stated above. It would seem that this issue will arise in an appropriate LTD case at some point in the future, and when it does, in order for there to be consistency with the *Bapoo*¹¹ decision, only the CPP benefit net of tax should be deducted. The following example of how this would work in practice is follows:

¹⁰ 154 D.L.R. (4th) 385, (sub nom. *Bapoo v. Co-operators General Insurance Co.*) 36 O.R. (3d) 616, (sub nom. *Bapoo v. Co-operators General Insurance Co.*) [1998] I.L.R. I-3512, 49 C.C.L.I. (2d) 133, 33 M.V.R. (3d) 135.

¹¹ *Supra*, note 5.

BAPOO APPROACH	Tax Treatment	Amount
LTD Benefit	Non-Taxable	\$2,500.00
CPP Benefit	Taxable	\$ 800.00
Tax on CPP Benefit Assuming 20% *rate of Tax		(\$ 160.00)
Net CPP Benefit	After Tax	\$ 640.00
Net LTD Benefit After offset of CPP benefit		\$1,860.00

*The applicable tax rate would be applied on a case-by-case basis

The way it is usually calculated at present is as follows:

CONVENTIONAL APPROACH	Tax Treatment	Amount
LTD Benefit	Non-Taxable	\$2,500.00
CPP Benefit	Taxable	\$ 800.00
Net LTD Benefit After offset of CPP benefit		\$1,700.00

A recent challenge to the direct offset of CPP benefits by using the all source limits provision under a group policy, was rejected by the Ontario Superior Court in *Perreault v. Manufacturers Life Insurance Co.*¹² The court rejected the argument that the all-source limit, which in this case was 85% can be used to lessen the amount of the offset from CPP benefits. The court accepted that the insurer was entitled to a direct

¹² [2006]I.L.R. 1-4525

offset of the amount of the CPP benefits, and the Plaintiff was not entitled to a combined LTD and CPP benefit that would total 85% of her pre-disability earnings.

Workplace Safety & Insurance Board (“WSIB” or “WCB”)

Most group LTD policies provide for an offset for Loss of Earning Benefits (“LOE”) paid by the WSIB. In a few situations, policies or plans have been written that preclude LTD coverage for workplace injuries, however, these are more the exception than the rule. The focus of the discussion is once again on co-ordination of benefits or offset provisions.

The most frequent difficulty in sorting out the interplay between WSIB and LTD benefits is that WSIB benefits are frequently denied based on the injury or illness not having arisen in the course of employment. In obvious cases, causation will not be difficult to sort out, such as an injury that clearly occurs during a workplace accident, such as a worker falling off a scaffold, or being struck by a forklift in the workplace.

The vexing illnesses and injuries are mental health conditions, chronic pain, fibromyalgia, repetitive strain and environmental occupational illnesses. The policy of the WSIB continues to evolve in regards to whether various conditions are recognized as being work-related. The significance of this for LTD carriers is that if the WSIB does not recognize the injury or illness as being work-related, no LOE will be payable and the claimant will be looking to the LTD insurer for payment of disability benefits.

For example, the policy with respect to chronic pain is as follows¹³:

“The WSIB will accept entitlement for chronic pain disability (CPD) when it results from a work-related injury and there is sufficient credible subjective and objective evidence establishing the disability.

¹³ <http://www.wsib.on.ca/wsib/wopm.nsf/Public/150403>

Not all claims involving persistent pain are adjudicated according to this policy. If pain is predominantly attributable to an organic cause or to the psychiatric conditions of post-traumatic stress disorder or conversion disorder, the worker will be compensated pursuant to the WSIB's policy on that organic or psychiatric condition. If, however, the chronic pain arises predominantly from psychological sources (other than post-traumatic stress disorder or conversion disorder, see [15-04-02, Psychotraumatic Disability](#)) or undetected organic sources, the pain will be considered for compensation purposes under the CPD policy

Eligibility criteria

For a worker to qualify for compensation for CPD, the following conditions must exist, and must be supported by all of the indicated evidence:

Condition	Evidence
A work-related injury occurred.	A claim for compensation for an injury has been submitted and accepted.
Chronic pain is caused by the injury.	<p>Subjective or objective medical or non-medical evidence of the worker's continuous, consistent, and genuine pain since the time of the injury,</p> <p>AND</p> <p>a medical opinion that the characteristics of the worker's pain (except its persistence and/or its severity) are compatible with the worker's injury, and are such that the physician concludes that the pain resulted from the injury.</p>
The pain persists 6 or more months beyond the usual healing time of the injury.	<p>Medical opinion of the usual healing time of the injury, the worker's pre-accident health status, and the treatments received,</p> <p>AND</p> <p>subjective or objective medical or non-medical evidence of the worker's continuous, consistent and genuine pain for 6 or more months beyond the usual healing time for the injury.</p>
The degree of pain is inconsistent with organic findings.	Medical opinion which indicates the inconsistency.
The chronic pain impairs earning capacity.	Subjective evidence supported by medical or other substantial objective evidence that shows the persistent effects of the chronic pain in terms of consistent and marked life disruption.

Definitions

Chronic pain disability (CPD) is the term used to describe the condition of a person whose chronic pain has resulted in marked life disruption.

Chronic pain is pain with characteristics compatible with a work-related injury, except that it persists for 6 or more months beyond the usual healing time for the injury.

Usual healing time is defined as the point in time, following an injury, at which the worker should have regained pre-accident functional ability, or reached a plateau in physical recovery.

Marked life disruption - Because pain is a subjective phenomenon, marked life disruption is the only useful measure of disability or impairment in chronic pain cases. Marked life disruption indicates the effect of pain experienced by the worker and the effect on the worker's activities of daily living, vocational activity, physical and psychological functioning, as well as family and social relationships.

There must be a clear and distinct disruption to a worker's life, but there is no particular requirement for this disruption to be either major or minor. The disruption in the worker's personal, occupational, social, **and** home life must be consistent, though the degree of disruption in each need not be identical.

The presence of "and" in the statement "social, occupational, **and** home life" suggests that all 3 must be present. However, there is no requirement that all 3 aspects of a person's life must be disrupted **to the same degree**.

Initially, the fact that the worker has not returned to employment may be an indication of marked life disruption, the assumption being that other components of the worker's life are disrupted as well. As the 6 month period progresses, the decision-maker is obliged to obtain evidence of disruption to each part of the worker's life - personal, occupational, social, and home.

A disruption to a worker's occupational life is also considered to exist if a worker has returned to employment, that has been modified to accommodate the CPD.

The following list of typical expected disruptions of functional abilities due to chronic pain is to be used when assessing the extent to which a CPD is affecting a worker's life.”

It can often take an extended period of time for a claimant to obtain a final decision from the WSIB and in the meantime, the LTD claim is proceeding. It is near impossible to predict which cases will meet the WSIB criteria where initial entitlement is rejected. LTD insurers must grapple with reasonable practices to avoid breaching the duty of good faith, and accordingly, claims must be adjudicated solely on the usual LTD criteria, irrespective of probable outcome of a WSIB claim.

It is beyond the scope of this paper to fully cover the complexities of the WSIB system and its' interplay with disability claims. It is perhaps overstating the obvious to suggest that the WSIB legislation, policies and procedures, not to mention the body of case law at the Workplace Safety and Insurance Appeal Board, is a minefield for the unwary.

It is important to understand the overlapping interplay between WSIB, CPP and LTD. We have already discussed the offset of CPP in the previous section, but it should be remembered that WSIB has its own offset policy when it comes to co-coordinating WSIB benefits—both Loss of Earnings (LOE) and Future Economic Loss Benefits (FEL)—with CPP.

“Loss of Earnings (LOE)

The *Workplace Safety and Insurance Act* provides:

When calculating LOE benefits, the amount of net average earnings the worker is able to earn in suitable employment or business after the injury must reflect any disability payments paid to the worker under the Canada Pension Plan (CPP) or the Quebec Pension Plan (QPP) in respect of the injury.”

Future Economic Loss (FEL)

The *Workers' Compensation Act* provides:

When calculating FEL benefits and determining the amount of net average earnings the worker is able to earn in suitable and available employment after the injury, the WSIB must have regard to any disability payments the worker may receive for the injury under the Canada Pension Plan (CPP) or the Quebec Pension Plan (QPP).¹⁴

It should be noted that WSIB offsets CPP disability benefits much like LTD insurers do, however it is WSIB policy to only deduct the contributor portion and not the amount allocated to dependents (see CPP discussion above).

Where a claimant is in receipt of LTD, CPP and WSIB, the impulse to double deduct should be avoided, although insurers and their counsel have certainly attempted this on some cases our office has been involved with. By way of example, it would be possible for a claimant to receive benefits from all three sources, subject to the application of the all-source limit. An example is as follows:

¹⁴ <http://www.wsib.on.ca/wsib/wopm.nsf/Public/180113>

Assuming a claimant with a base salary of \$50,000.00, an LTD plan that pays 70% of base salary or \$2,917 per month; CPP of \$800.00 per month, and WSIB of \$2,479 per month (based on a marginal tax rate of 30%), the correct LTD amount would be \$438.00 per month. This is calculated by deducting CPP and the net WSIB monthly benefits rather than deducting the whole CPP and WSIB benefits, and no double recovery occurs.

Item	Monthly Benefit
Gross Base Salary \$50,000/12	\$4,166.67
All-Source Limit (85%) 85% of \$4,166.67	\$3,541.67
LTD Benefit (70% base) 70% of \$4,166.67	\$2,917.00
CPP benefit	\$800.00
WSIB LOE benefit	\$2,479.00
WSIB net of CPP	\$1,679.00
Net LTD Benefit (Direct Offset)	\$438.00
Net LTD Benefit (All-Source Limit Offset)	\$1,062.67
TOTAL MONTHLY BENEFITS (Direct Offset) \$438 (LTD) + \$1,679 (WSIB) + \$800 (CPP)	\$2,917.00
TOTAL MONTHLY BENEFITS (Allsource) \$1,062.67 (LTD) + \$1,679 (WSIB) + \$800 (CPP)	\$3,541.67

Another contentious area in the interplay between WSIB and LTD arises where a claimant makes an election under the WSIB Act to pursue a claim for accident compensation in Tort rather than through the WSIB system.

The applicable provisions in the WSIB Act are as follows:

s.26(2)

Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, same-sex partner, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer.

s.28(1)

In respect of the worker's injury or disease, a worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

s.28(2)

In respect of the worker's injury or disease, a worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

s.28(3)

If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, s.28(1) applies only if the workers were acting in the course of their employment.

s.30(1)

This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease.

s.30(2)

The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the WSIB of the option elected.

s.30(4)

The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death.

s.30(6)

If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan.

s.30(14)

The following rules apply if the worker or survivor elects to commence the action instead of claiming benefits under the insurance plan

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph three below.
2. If the worker or survivor settles the action and the WSIB approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph three below.
3. The amount is the cost of the benefits that would have been provided under the insurance plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action.

s.31(1)

A party to an action or an insurer from whom statutory accident benefits are claimed

under section 268 of the *Insurance Act* may apply to the Workplace Safety Insurance Appeals Tribunal (WSIAT) to determine whether,

- a. because of this Act, the right to commence an action is taken away;
- b. the amount that a person may be liable to pay in an action is limited by this Act;
- c. the plaintiff is entitled to claim benefits under the insurance plan.

s.31(2)

The WSIAT has exclusive jurisdiction to determine a matter described in subsection (1).¹⁵

The controversy within the WSIB – LTD interplay is whether an election by a claimant to pursue tort and therefore LTD benefits, instead of WSIB benefits allows the LTD insurer to deduct WSIB benefits in any event because WSIB benefits were either received or the claimant was entitled to receive them. Most group policies have similar provisions that put the obligation of pursuing collateral sources onto the claimants, and failure to do so can give rise to a failure to mitigate argument should the matter proceed to trial. In *Abdulrahim v. Manufacturers Life Insurance Co.*¹⁶ the claimant sustained injuries to his right arm and leg in a workplace accident. LTD benefits were applied for as well as WSIB benefits. The claimant's lawyer subsequently advised the WSIB that the claimant's election was being withdrawn and the WSIB accepted the withdrawal provided that the claimant agreed to reimburse WSIB in the event of ultimate recovery of all benefits paid to that date. LTD was approved but insurer took the position that they could offset WSIB benefits received or that the claimant was entitled to receive. The

¹⁵ <http://www.wsib.on.ca/wsib/wopm.nsf/Public/150105>

¹⁶ (2003), 2003 CarswellOnt 2513, 44 M.V.R. (4th) 285, [2003] O.J. No. 2592, 65 O.R. (3d) 543, 1 C.C.L.I. (4th) 252, Himel, J. (Ont. S.C.J.)

court found that once the tort election was made the claimant was no longer entitled to receive WSIB benefits and therefore the insurer could not offset them. Furthermore, the court rejected any argument regarding claimant's failure to mitigate or to pursue benefits that were readily available to him, as required under the group policy. The court further cited that subrogation provisions would address any concerns about the potential for double recovery.¹⁷

The more recent case of *Richer v. Manulife Financial*¹⁸ appears to directly contradict the decision in *Abdulrahim*¹⁹. The facts were similar, and Justice Wein indicated that an assessment of *Abdulrahim* was essential to the decision in the *Richer* case.²⁰ The essential difference in the view of Justice Wein was that in *Abdulrahim*, "...the insurance policy was a private contract of adhesion and not statutorily mandated, and also emphasized the fact that the insurer maintained its' subrogation rights."²¹

Justice Wein elaborated as follows:

"The latter is an important distinction between *Abdulrahim* and this case, where subrogation rights do not exist. In this case, the insured would not be able to recover from a judgment against the tortfeasor, so the principles enunciated in *Madill* and subsequently recognized by the statute dictate a different result than the result that occurred in *Abdulrahim*. Under s. 267 of the *Insurance Act (Ontario)*, the defendants in this case have no right of subrogation. Consequently, if *Abdulrahim* were extended to this policy, the insurer would be required to fund an unrecoverable liability which the

¹⁷ Subrogation rights are beyond the scope of this paper, however, it is settled law that unless the claimant recovers 100% of her losses, there is no right of subrogation. It should also be noted that rights of subrogation have been circumscribed under Ontario no-fault motor vehicle insurance laws.

¹⁸ 2006 CarswellOnt 3017, [2006] I.L.R. I-4507, 2006 C.E.B.& P.G.R. 8198, Wein, J. (Ont. S.C.J.)

¹⁹ Supra, note 15

²⁰ Supra, note 17 at par.22.

²¹ Supra, note 17 at par. 25

policy was not designed to cover.”²² The pertinent sections of the Insurance Act, read as follows:

“**267 (1)** The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by...

(c) all payments that the person has received or that were or are available... under the law of any jurisdiction or under an income continuation benefit plan and by the present value of any such payments to which the person is entitled.”

267.8 (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 income loss and loss of earning capacity shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.
2. 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.
3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff’s occupation or employment. 1996, c. 21, s. 29.²³

Richer is under appeal and the outcome at the Ontario Court of Appeal will probably not be out for at least 6 months to a year. It is submitted here that *Richer* appears to be wrongly decided. The distinctions drawn between *Abdulrahim* and *Richer* don’t appear to be viable on a number of counts. Justice Wein mentions that the LTD policy is private and WSIB is statutory scheme, however, that is exactly the same situation in the *Richer* case. The concern about subrogation appears to be hollow insofar as the statutory removal of the right of subrogation was motivated by desire to

²² Supra, note 17 at par. 26 Reference to the *Madill* case is to *Madill v. Chu*, (1976), 71 D.L.R. (3d) 295 (S.C.C.) per *Ritchie*.

²³ *Insurance Act, R..S.O.*

reduce automobile insurance premiums, rather than permitting LTD insurers to deduct benefits that a claimant will never receive. Furthermore, *Richer* results in a situation where a disabled person may be left without any means of financial support while awaiting the outcome of their tort claim, which is wholly unfair to a claimant. Finally the reference to the *Madill* case omits any reference to the right of election that exists in the WSIB Act. *Madill* involved a case where a claimant failed to apply for benefits rather than electing to deny such benefits in favour of tort. Under the WS&IB Act, the right of election is an either/or proposition. The claimant can either elect to pursue their rights in tort (in applicable circumstances) or they can pursue their claim for WSIB benefits, but not both.

Time will tell how the Ontario Court of Appeal will deal with this, and whether their decision will lead to a further appeal on this issue. At present, we are left to try and dovetail given fact scenarios within the two cases.

Employment – Severance

In the area of monies received from the employer, again, the outcome will depend on the wording in the policy. Absent specific wording, and even where there is specific wording, case law suggests that severance payments won't be deducted from Long-Term Disability Benefits because severance is distinguished from salary continuation or benefits due to disability, and treated as compensation for years of service.

It is also important to consider who is bearing the cost of the availability of disability benefits (either directly or indirectly), and what consideration may have been given by the employer in order for such benefits to form part of the employment contract package.

In *O.N.A. v. Mount Sinai Hospital*²⁴, the Employer was ordered to pay severance to an employee when the contract of employment was frustrated due to the employee's disability, which has now been codified in Regulation 288/1 Section 9 under the Employment Standards Act.

12 The Hospital and the Attorney General argue that while there are multiple purposes of severance pay, the dominant purpose is prospective, and is directed toward compensating employees for capital losses going forward as they find new employment. Since employees whose contracts have been frustrated due to illness or injury are unlikely to re-enter the workforce, denying them severance pay is not discriminatory.

13 By contrast, the O.N.A. argues that the purpose of severance pay is retrospective, and is intended to compensate long-serving employees for their years of service and investment in the employer's business. Employees whose contracts have been frustrated due to illness or injury have made equally valuable contributions as have other employees who qualify for severance pay. Therefore, the O.N.A. submits the denial of severance pay to these employees constitutes discrimination.

²⁴ [2005] O.J. No. 1739 (C.A.)

14 The Divisional Court took the latter view. It concluded that "legislative history, together with relevant jurisprudence, make it clear that severance pay (in contrast to termination pay in lieu of notice) is an earned benefit that compensates long-serving employees for their past services and for their investment in the employer's business. It is properly payable for any non-culpable cessation of employment."²⁵

The Court of Appeal's conclusion was largely based on a hybrid of the above two rationales, recognizing that severance is designed to assist terminated employees who would strive to re-enter the workforce as well as compensating them for years of service, unless they have been terminated for cause. In the context of LTD policies, the case law has focused on compensation for years of service, rather than the re-entry approach.

In *Sills v. Children's Aid Society of Belleville*,²⁶ the Ontario Court of Appeal rejects the notion that severance would be deductible from LTD benefits, as stated by Justice Simmons:

“ I consider it reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to infer that parties would agree that an employee would retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question.”²⁷

The case law is not settled in this area as the treatment in a particular case will depend on the particular circumstances of each case, including the nature of the employment relationship and any agreements or implied agreements entered into either before or during the employment relationship. The leading Supreme Court of Canada

²⁵ Supra, note 24 at pars. 12-14.

²⁶(2001), 53 O.R. (3d) 577 (C.A.)

²⁷ Supra, note 26 at paragraph 45.

case is *Sylvester v. B.C.*,²⁸ resulted in a LTD benefits being deducted from a severance award. However, in *McNamara v. Alexander Centre Industries Ltd.*,²⁹ which was decided after *Sylvester*, the Court disallowed deduction of LTD benefits from a severance award primarily because the availability of LTD coverage to the employee was made available due to concessions in other parts of the employment contract, and therefore, the reduction of severance was not considered to be something reasonably contemplated by the parties when they entered into the employment contract. The case of *Dowling v. TNT Logistics North America*³⁰ is further support for the argument that neither LTD can be deducted from severance nor can severance be deducted from LTD:

“There is nothing in the employment contract that would indicate that Dowling cannot receive both employment benefits and LTD benefits. Further, the provisions of the Plan are contractual provisions with the insurer, not with TNT. There are the usual provisions that state that an employee on LTD has his or her benefits reduced if an employee is earning money elsewhere, **I do not interpret these provisions to apply to an employee receiving damages for wrongful dismissal; an insurer under an LTD policy would be hard-pressed to deduct these damages**”³¹

STATUTORY ACCIDENT BENEFITS (S.A.B.S) – A.K.A. NO FAULT BENEFITS

In Ontario, LTD benefits are considered primary and therefore claimants must exhaust entitlement under private or group disability insurance policies for both short-term and long-term disability benefits before auto insurers will be obligated to pay income replacement and other classes of weekly benefits (caregiver, non-earner benefits). Where the STD or LTD benefits have been denied, SABS may be payable, with the

²⁸ (1997) 146 D.L.R. (4th) 207 (S.C.C.)

²⁹ 2000 CarswellOnt 1912, 2 C.C.E.L. (3d) 310 (Ont. S.C.J. May 24, 2000)

³⁰ 2005 CarswellOnt 2089 (Ont. S.C.J. May 24, 2005)

³¹ *Supra*, note 30, par. 13.

understanding that any ultimate recovery from the STD/LTD insurer will be repayable to the auto insurer.³²

EMPLOYMENT INSURANCE, SOCIAL ASSISTANCE, ONTARIO DISABILITY SUPPORT PROGRAM – “means-based government assistance”

Unlike, CPP, monies received under the above programs is subject to repayment when and if disability benefits are recovered, if the funds are provided for income replacement. While Employment Insurance entitlement is based upon an accumulation of a sufficient number of weeks of insurable earnings, social assistance and ODSP are based on satisfying a means test, or entitlement based on economic need and residency rather than on contributing into the government plan. Accordingly, social assistance and ODSP won't be available to an Ontario resident unless they can satisfy the applicable authority that they are lacking in any reasonable means of economic support. Home ownership and ownership of other assets will disqualify individuals from qualifying for these benefits.

In the case of EI (based on disability), Welfare (Social Assistance) and ODSP, repayment will be required if compensation is recovered for the periods of the effective losses, whether funds are recovered through disability coverage or tort compensation. In the case of ODSP and Welfare, there are exemptions of up to \$100,000 and \$25,000 respectively for general damages (pain and suffering), or other damages not characterized as income replacement. So, an award from the Ontario Human Rights Commission would qualify for the exemptions from repayment noted above, whereas, a lump sum

³² This applies to Ontario and the rules may be different in other provinces.

settlement of an LTD case, where the amounts recovered are strictly for past, present and future disability benefits, would not be exempt, unless some portion of the settlement is characterized as damages, as outlined above.

Employment Insurance

Employment Insurance Sickness Benefits are subject to repayment as stated on the Employment Insurance website, under frequently asked questions:

I have applied for my sickness benefit plan, however my claim is either not settled or my entitlement to the sickness benefit plan is being contested. Can I receive EI sickness benefits while I wait for a decision on my entitlement to these benefits?

If eligible, you may receive EI sickness benefits while awaiting a decision about your sick leave pay or wage loss insurance. However, you must sign an agreement to inform us of the decision and repay the EI benefits, which means you must repay any and all EI benefit overpayments received while awaiting a decision on your sick leave or wage loss insurance (WLI) claim.³³

Sub-sections 45-46 of the Employment Insurance Act contain the statutory obligation to repay benefits received in the event that other funds are received covering the same period. The sections are as follows:

Return of benefits by claimant

45. If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

Return of benefits by

46. (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other

³³ http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/ei/faq/faq_special.shtml&hs=tyt#I

employer or other person

person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.³⁴

In the case of *Fichter v. Mann*³⁵ the Court interpreted s. 45 as follows, in the context of a wrongful dismissal award.

[25] Section 46(1) of the *Employment Insurance Act*, S.C. 1996 c. 23 requires that anyone who becomes liable to pay damages for wrongful dismissal under a court order, ascertain whether any employment insurance benefits received are re-payable in accordance with s. 45 and if so, that amount is to be deducted and remitted to the Receiver General as a repayment of overpayment of benefits. Section 45 indicates that any employment insurance benefits received for the same period for which an award of damages for wrongful dismissal is made must be repaid by the recipient.

At first glance, it might appear that these sections of the Employment Insurance Act apply only to employment law cases, however, the section identifies employers, trustees in bankruptcy, or *any other person* that may be liable to make payments for the period during which EI benefits were paid.

*Khairati v. Prasad*³⁶ is to the same effect in a tort case where it appears that the obligation to repay is part of the “subrogation exception” outlined by Justice McLachlin

³⁴ http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/ei/legislation/ei_act_part1_12.shtml&hs=tyt#45

³⁵ 2002 CarswellSask 741, Saskatchewan Court of Queen's Bench, 2002, at par. 25.

of the Supreme Court of Canada in *Ratyck v. Bloomer*.³⁷ The exception is summarized as follows:

These considerations suggest the following rule. As a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the Court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the *Workers' Compensation Act*, R.S.O. 1980, c. 539, expressly provide for payment to the benefactor of any wage benefits recovered. It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. Absent legislation or a third party claim, the only device available to the Court to effect transference to the third party would be trust. Given that the third party has effective ways apart from trust of enforcing the claim, I would not extend the trust doctrine applied in *Teno* and *Thornton* to collateral benefits in the usual case. At the same time, I would not rule out that a judge might use this device to transfer payment to a third party where the Judge is satisfied that this is both necessary and appropriate in the interests of justice. Generally speaking, however, some sort of obligation, moral if not legal, to repay the third party would need to be established to permit application of the trust device.³⁸

Social Assistance and Ontario Disability Support Program

Awards for pain and suffering (general damages – which would include damages for mental distress and other types of extra-contractual damages), are exempt from repayment, up to the amount of \$25,000 for general social assistance, and up to \$100,000 for ODSP claimants.³⁹

³⁶ 2002 CarswellBC 605, 2002 BCSC 360, [2002] B.C.J. No. 513 (B.C. S.C. Mar 11, 2002)

³⁷ 1990 CarswellOnt 644, 3 C.C.L.T. (2d) 1, (sub nom. Bloomer v. Ratyck) 30 C.C.E.L. 161, 69 D.L.R. (4th) 25, [1990] 1 S.C.R. 940, 107 N.R. 335, 73 O.R. (2d) 448 (note), 39 O.A.C. 103, [1990] R.R.A. 651

³⁸ Supra, note 36 at par. 76.

³⁹ Awards For Pain And Suffering, Directive 16.6, http://www.mcass.gov.on.ca/NR/MCFCS/OW/English/16_6.doc and ODSP Income Support, Directive 4.6 Compensation Awards, http://www.mcass.gov.on.ca/NR/MCFCS/ODSP/ISDIR/en/4_6.doc

Social Assistance and ODSP are means-based entitlements, unlike CPP Disability Benefits which are based on contributions into the plan over the working life of the claimant.

They are also subject to the *Ratych*⁴⁰ subrogation noted above, and are therefore not subject to co-ordination or offset.

Conclusion

A thorough understanding of the rules regarding offsets and co-ordination of benefits is crucial to the proper adjudication, settlement and litigation of disability claims. During adjudication, improper application of offsets could support a bad faith claim later should the matter ultimately be litigated. The duty of good faith surely extends to a good faith application of the provisions of the contract.

When a case moves into settlement negotiations, considerations about offsets can materially affect the applicable quantum that the matter should be concluded for. Again, a thorough understanding of the policy and its' interplay with the applicable collateral sources, cannot be overstated.

Finally, if and when the matter ends up before the Courts, or other dispute resolution forums, such considerations are invariably front and centre, and you will be required to ensure that the trier of fact is provided with the necessary tools to navigate through these issues.

⁴⁰ Supra, note 36.