

2012 ONCA 384  
Ontario Court of Appeal

Demers v. B.R. Davidson Mining & Development Ltd.

2012 CarswellOnt 7039, 2012 C.E.B. & P.G.R. 8487 (headnote only), 2012 ONCA  
384, 111 O.R. (3d) 42, 11 C.C.L.I. (5th) 38, 215 A.C.W.S. (3d) 200, 292 O.A.C.  
164, 351 D.L.R. (4th) 64, 35 M.V.R. (6th) 93, 94 C.C.L.T. (3d) 30, 98 C.C.P.B. 176

**Lynda Demers, Keith Verdenik, Jonelle Demers, a minor under the age  
of eighteen, Kevin Verdenik, a minor under the age of eighteen years  
and Kate-Lyn Verdenik, a minor under the age of eighteen years, by their  
Litigation Guardian Keith Verdenik (Plaintiffs/Respondents) and Dan Monty  
and B.R. Davidson Mining & Development Ltd. (Defendants/Appellants)**

John Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: November 2, 2011

Judgment: June 7, 2012

Docket: C53780

Proceedings: affirming *Demers v. B.R. Davidson Mining & Development Ltd.* (2011), 2011 CarswellOnt 3548, [2011] I.L.R.  
I-5153, 86 C.C.L.T. (3d) 148, 2011 ONSC 2046, 334 D.L.R. (4th) 291, 106 O.R. (3d) 513, 1 C.C.L.I. (5th) 42 (Ont. S.C.J.)

Counsel: Nestor E. Kostyniuk, for Appellants

Robert E. Somerleigh, Ruby E. Van Bendegem, for Respondents

Subject: Torts; Civil Practice and Procedure; Insurance

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Insurance**

**XII** Automobile insurance

**XII.5** No-fault benefits

**XII.5.h** Reduction by benefits received from other sources (collateral benefits)

**XII.5.h.i** General principles

**Remedies**

**I** Damages

**I.5** Damages in tort

**I.5.a** Personal injury

**I.5.a.i** Special damages (pre-trial pecuniary loss)

**I.5.a.i.C** Collateral benefits

**I.5.a.i.C.5** Statutory and government benefits

**Remedies**

**I** Damages

**I.5** Damages in tort

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**I.5.a.i** Special damages (pre-trial pecuniary loss)

[I.5.a.i.C Collateral benefits](#)[I.5.a.i.C.6 Miscellaneous](#)**Headnote****Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Collateral benefits — Statutory and government benefits**

Plaintiff was injured in car accident in April 1999 — Plaintiff continued working until February 2003 when she stopped working due to disability — Parties disagreed as to whether Canada Pension Plan and Hospitals of Ontario Pension Plan disability benefits received by plaintiff were deductible from damages on account of income loss or loss of earning capacity — Parties brought motion seeking direction of court — Motion judge found that neither benefits were deductible, as they were not received for loss of income or loss of earning capacity — Defendants appealed — Appeal dismissed — Addition of term "loss of earning capacity" in s. 267.8(1) ¶ 2 of Insurance Act did not change non-deductibility of benefits at common law — Benefits were not paid in respect of incident, but rather in respect of plaintiff's disability — Thus, on wording of s. 267.8(1) ¶ 2 of Act, no deduction was required.

**Remedies --- Damages — Damages in tort — Personal injury — Special damages (pre-trial pecuniary loss) — Collateral benefits — Miscellaneous**

Plaintiff was injured in car accident in April 1999 — Plaintiff continued working until February 2003 when she stopped working due to disability — Parties disagreed as to whether Canada Pension Plan and Hospitals of Ontario Pension Plan disability benefits received by plaintiff were deductible from damages on account of income loss or loss of earning capacity — Parties brought motion seeking direction of court — Motion judge found that neither benefits were deductible, as they were not received for loss of income or loss of earning capacity — Defendants appealed — Appeal dismissed — Addition of term "loss of earning capacity" in s. 267.8(1) ¶ 2 of Insurance Act did not change non-deductibility of benefits at common law — Benefits were not paid in respect of incident, but rather in respect of plaintiff's disability — Thus, on wording of s. 267.8(1) ¶ 2 of Act, no deduction was required.

**Insurance --- Automobile insurance — No-fault benefits — Reduction by benefits received from other sources (collateral benefits) — General principles**

Plaintiff was injured in car accident in April 1999 — Plaintiff continued working until February 2003 when she stopped working due to disability — Parties disagreed as to whether Canada Pension Plan and Hospitals of Ontario Pension Plan disability benefits received by plaintiff were deductible from damages on account of income loss or loss of earning capacity — Parties brought motion seeking direction of court — Motion judge found that neither benefits were deductible, as they were not received for loss of income or loss of earning capacity — Defendants appealed — Appeal dismissed — Addition of term "loss of earning capacity" in s. 267.8(1) ¶ 2 of Insurance Act did not change non-deductibility of benefits at common law — Benefits were not paid in respect of incident, but rather in respect of plaintiff's disability — Thus, on wording of s. 267.8(1) ¶ 2 of Act, no deduction was required.

**Table of Authorities****Cases considered by *John Laskin J.A.*:**

*B. (M.) v. British Columbia* (2003), 2003 CarswellBC 2409, 2003 CarswellBC 2410, 2003 SCC 53, 309 N.R. 375, 18 B.C.L.R. (4th) 60, 44 R.F.L. (5th) 320, 187 B.C.A.C. 161, 307 W.A.C. 161, [2003] R.R.A. 1071, [2003] 2 S.C.R. 477, 230 D.L.R. (4th) 567, [2003] 11 W.W.R. 262, 19 C.C.L.T. (3d) 1 (S.C.C.) — referred to

*Boarelli v. Flannigan* (1973), 1973 CarswellOnt 872, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (Ont. C.A.) — considered

*Bradburn v. Great Western Railway* (1874), L.R. 10 Exch. 1, [1874-80] All E.R. Rep. 195 (Eng. Exch.) — referred to

*Cooper v. Miller* (1994), (sub nom. *Cunningham v. Wheeler*) [1994] 4 W.W.R. 153, (sub nom. *Cunningham v. Wheeler*) 23 C.C.L.I. (2d) 205, (sub nom. *Cooper v. Miller (No. 1)*) 164 N.R. 81, (sub nom. *Cooper v. Miller (No. 1)*) 66 W.A.C. 1, (sub nom. *Cunningham v. Wheeler*) 88 B.C.L.R. (2d) 273, (sub nom. *Cunningham v. Wheeler*) 2 C.C.P.B. 217, (sub nom. *Cunningham v. Wheeler*) 20 C.C.L.T. (2d) 1, 1994 CarswellBC 121, (sub nom. *Cooper v. Miller (No. 1)*) 41 B.C.A.C. 1, (sub nom. *Cunningham v. Wheeler*) 113 D.L.R. (4th) 1, 1994 CarswellBC 1235, [1994] 1 S.C.R. 359 (S.C.C.) — followed

*Cugliari v. White* (1998), 159 D.L.R. (4th) 254, 109 O.A.C. 109, 38 O.R. (3d) 641, 1998 CarswellOnt 1789, 21 C.P.C. (4th) 213 (Ont. C.A.) — considered

*Gill v. Canadian Pacific Railway* (1973), (sub nom. *Canadian Pacific Railway Ltd. v. Gill*) [1973] 4 W.W.R. 593, (sub nom. *Canadian Pacific Railway Ltd. v. Gill*) 37 D.L.R. (3d) 229, 1973 CarswellBC 112, (sub nom. *Canadian Pacific Railway Ltd. v. Gill*) [1973] S.C.R. 654 (S.C.C.) — considered

*Guy v. Trizec Equities Ltd.* (1979), 1979 CarswellNS 101, 10 C.C.L.T. 197, 99 D.L.R. (3d) 243, 32 N.S.R. (2d) 345, 54 A.P.R. 345, 27 N.R. 301, 1979 CarswellNS 107, [1979] 2 S.C.R. 756 (S.C.C.) — considered

*Kosanovic v. Wawanesa Mutual Insurance Co.* (2004), 184 O.A.C. 269, 8 C.C.L.I. (4th) 225, 237 D.L.R. (4th) 441, 49 M.V.R. (4th) 165, 70 O.R. (3d) 161, 2004 CarswellOnt 1164 (Ont. C.A.) — considered

*M. (L.M.) v. Nova Scotia (Attorney General)* (2011), 2011 NSCA 48, 2011 CarswellNS 332, 957 A.P.R. 243, 303 N.S.R. (2d) 243 (N.S. C.A.) — considered

*MacKenzie v. Rogalasky* (2011), 2011 CarswellBC 70, 2011 BCSC 54 (B.C. S.C.) — considered

*R. v. McIntosh* (1995), 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4, 1995 CarswellOnt 518, 36 C.R. (4th) 171, 95 C.C.C. (3d) 481 (S.C.C.) — considered

*Ratych v. Bloomer* (1990), 1990 CarswellOnt 644, 73 O.R. (2d) 448 (note), [1990] R.R.A. 651, 1990 CarswellOnt 995, 30 C.C.E.L. 161, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, 107 N.R. 335, 39 O.A.C. 103, 3 C.C.L.T. (2d) 1 (S.C.C.) — followed

*Sarvanis v. Canada* (2002), 2002 C.E.B. & P.G.R. 8412 (headnote only), 284 N.R. 263, [2002] 1 S.C.R. 921, 2002 SCC 28, 2002 CarswellNat 537, 2002 CarswellNat 538, 210 D.L.R. (4th) 263 (S.C.C.) — followed

*Scott v. State Farm Mutual Automobile Insurance Co.* (2006), 2006 CarswellOnt 4350, 39 C.C.L.I. (4th) 318 (Ont. Div. Ct.) — referred to

*Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1998), 1998 CarswellOnt 404, 38 O.R. (3d) 590, [1998] I.L.R. I-3592, 2 C.C.L.I. (3d) 222, 37 M.V.R. (3d) 105 (Ont. Gen. Div.) — referred to

*Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1999), 1999 CarswellOnt 1835, 44 O.R. (3d) 545, [1999] I.L.R. I-3726, 44 M.V.R. (3d) 280, 11 C.C.L.I. (3d) 139, 175 D.L.R. (4th) 154, 122 O.A.C. 29 (Ont. C.A.) — referred to

*Walker v. Ritchie* (2005), 2005 CarswellOnt 1574, 197 O.A.C. 81, 31 C.C.L.T. (3d) 205, 25 C.C.L.I. (4th) 60, 12 C.P.C. (6th) 51 (Ont. C.A.) — considered

**Statutes considered:**

*Automobile Insurance Rate Stability Act, 1996*, S.O. 1996, c. 21  
Generally — referred to

*Canada Pension Plan*, R.S.C. 1985, c. C-8  
Generally — referred to

s. 42(2)(a) — referred to

*Criminal Code*, R.S.C. 1985, c. C-46  
Generally — referred to

*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50  
s. 9 — considered

*Insurance Act*, R.S.O. 1990, c. I.8  
Generally — referred to

s. 267 — considered

s. 267(1) — considered

s. 267.8 [en. 1996, c. 21, s. 29] — considered

s. 267.8(1) [en. 1996, c. 21, s. 29] — considered

s. 267.8(1) ¶ 2 [en. 1996, c. 21, s. 29] — considered

*Insurance Statute Law Amendment Act, 1990*, S.O. 1990, c. 2  
Generally — referred to

*Insurance Statute Law Amendment Act, 1993*, S.O. 1993, c. 10  
Generally — referred to

*Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F  
Generally — referred to

**Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194  
R. 21.01(1)(a) — referred to

**Regulations considered:**

*Insurance Act*, R.S.O. 1990, c. I.8

*Court Proceedings for Automobile Accidents that occur on or after November 1, 1996*, O. Reg. 461/96

s. 5.2 [en. O. Reg. 312/03] — referred to

s. 5.2(2) ¶ 1 [en. O. Reg. 312/03] — considered

**Authorities considered:**

Cooper-Stephenson, Ken, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Thomson Canada, 1996)

Ontario, Ministry of the Attorney General, *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*, Vol. 1, by Coulter A. Osborne (Toronto: Ontario Legislative Library Technical Services and Systems, 1988)

Sullivan, Ruth, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007)

APPEAL by defendants from judgment reported at *Demers v. B.R. Davidson Mining & Development Ltd.* (2011), 2011 CarswellOnt 3548, [2011] I.L.R. I-5153, 86 C.C.L.T. (3d) 148, 2011 ONSC 2046, 334 D.L.R. (4th) 291, 106 O.R. (3d) 513, 1 C.C.L.I. (5th) 42 (Ont. S.C.J.), finding that plaintiff's *Canada Pension Plan* and *Hospitals of Ontario Pension Plan* disability benefits were not deductible from damages on account of income loss or loss of earning capacity.

**John Laskin J.A.:**

**A. Introduction**

1 In April 1999, the respondent, Lynda Demers, was injured in a car accident. She has sued the defendants for damages for her personal injuries. At the time of the accident, Ms. Demers worked for St. Joseph's Care Group. She continued to work there after the accident until February 2003 when she stopped "due to disability". She then applied for and received two pension disability benefits: Canada Pension Plan (CPP) disability benefits and Hospitals of Ontario Pension Plan (HOOP) disability benefits.

2 The parties brought a motion on an agreed statement of facts and on consent under rule 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine whether as a matter of law the CPP and HOOP disability benefits would be deductible under s. 267.8(1)2 of the *Insurance Act*, R.S.O. 1990, c. I-8, from any award for loss of income or loss of earning capacity, and if so, whether the deduction should be gross or net of income tax. Section 267.8(1)2 provides:

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:

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 The motion judge, Shaw J., thoroughly analysed the legislative history of s. 267 and the relevant case law, and determined that neither benefits were deductible. He concluded that these benefits were paid because of Ms. Demers' disability; they were not "received for loss of income or loss of earning capacity". He also determined, that if he were wrong, and either or both benefits were deductible, the deduction should be net of the income tax Ms. Demers pays on these benefits.<sup>1</sup>

4 The defendants appeal and ask to vary the motion judge's decision. They accept that neither the CPP nor HOOP disability benefits compensate Ms. Demers for loss of income. However, they submit that both benefits compensate her

for loss of earning capacity and are therefore deductible under the statute. The defendants also submit that the deduction should be gross rather than net of income tax.

5 Ms. Demers asks that we uphold the decision of the motion judge for either of two reasons. First, she submits that she receives CPP and HOOP benefits simply because of her disability and not for any loss of earning capacity. Second, she submits that she does not receive these benefits "in respect of the incident", that is in respect of the car accident in which she was injured. Ms. Demers also submits that the motion judge correctly decided that any deduction should be net of income tax.

6 I would dismiss the appeal. I agree with the conclusion of the motion judge. My reasons will focus on the specific arguments raised in this court.

## **B. The CPP and HOOP Disability Benefits**

7 Ms. Demers had to apply for and meet certain specified criteria to be entitled to receive these benefits. However, and this is the important point, her entitlement did not depend on her being employed at the time of her application, on proving an income loss, or, indeed, on suffering an income loss: see *Cugliari v. White* (1998), 38 O.R. (3d) 641 (Ont. C.A.), at pp. 647-48; and *Scott v. State Farm Mutual Automobile Insurance Co.* (2006), 39 C.C.L.I. (4th) 318 (Ont. Div. Ct.), at para. 11.

### **(a) CPP Disability Benefits**

8 Ms. Demers was entitled to CPP disability benefits because:

- She met a minimum qualifying period of work — "valid earnings and contributions" for four of the last six calendar years, and;
- She suffered a "severe and prolonged mental or physical disability" under s. 42(2)(a) of the *Canada Pension Plan*, R.S.C., 1985, c. C-8.

### **(b) HOOP Disability Benefits**

9 To receive HOOP benefits Ms. Demers was required to:

- Be a member of the plan for two years and make the required contributions before the date of her disability;
- Resign from her employment and apply for the benefits; and
- Be totally and permanently disabled.

Ms. Demers met these requirements.

## **C. Background**

### **(a) Common Law Principles**

10 Section 267.8 of the *Insurance Act* modified the common law on the deductibility of benefits from tort awards. I begin with a brief review of the common law principles. I do so to show that the CPP and HOOP benefits Ms. Demers receives would not be deductible at common law. Their non-deductibility at common law provides the context for assessing the impact of s. 267.8 of the *Insurance Act*.

11 The common law principles on the deductibility of benefits are well established and are discussed at length by Justices McLachlin and Cory in their reasons in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 (S.C.C.), and *Cooper v. Miller*, [1994] 1 S.C.R. 359 (S.C.C.). The main goal of tort law is to compensate injured plaintiffs for the full extent of their losses

but not to over compensate them. This prohibition on over compensation, known as the rule against double recovery, has allowed for limited exceptions. The exception applicable to this appeal is the private insurance exception, also known as a collateral benefits rule.

12 Under this exception, payments received under an insurance policy are not deducted from an injured plaintiff's tort award even though the effect of this exception may be to "over compensate" the plaintiff. The exception originated in the English case of *Bradburn v. Great Western Railway* (1874), [1874-80] All E.R. Rep. 195 (Eng. Exch.), and has been consistently applied by Canadian courts. For example, in *Boarelli v. Flannigan*, [1973] 3 O.R. 69 (Ont. C.A.), this court affirmed that in personal injuries cases collateral benefits should not be taken into account in assessing damages for loss of earnings or loss of earning capacity.

13 Then, in *Gill v. Canadian Pacific Railway*, [1973] S.C.R. 654 (S.C.C.), at p. 670, the Supreme Court of Canada extended the private insurance exception to CPP payments because they "are so much of the same nature as contracts of insurance". In other words, they are akin to payments under a private insurance policy. In the later case of *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756 (S.C.C.), the Supreme Court relied on *Gill v. Canadian Pacific Railway* in holding that payments under a company pension plan were not deductible from a tort award.

14 In *Ratych v. Bloomer* and then in *Cooper v. Miller*, the Supreme Court revisited the collateral benefits rule and discussed the rationale for maintaining it and for limiting its reach. McLachlin J., who wrote for the majority in *Ratych* and for the minority in *Cooper*, would have limited the scope of the exception to non-indemnity payments — that is payments of a previously determined amount on proof of a specified event, whether or not the plaintiff has incurred a pecuniary loss. Indemnity payments — that is payments intended to compensate an injured plaintiff for a pecuniary loss — would be deductible from a tort award. Cory J., who wrote for the minority in *Ratych* and for the majority in *Cooper*, maintained the private insurance exception that began with *Bradburn*.

15 For the purpose of this appeal, whether one adopts Cory J.'s approach or McLachlin J.'s approach, both the CPP and the HOOP disability benefits Ms. Demers receives would not be deductible at common law. They come within the private insurance exception, which the Supreme Court of Canada expressly extended to CPP benefits. And under McLachlin J.'s approach, they are non-indemnity payments. They are paid to Ms. Demers on account of her disability and do not depend on her having incurred an income loss.

16 Thus, the principle question on this appeal is whether s. 267.8(1)2 overrides the non-deductibility of these benefits at common law. To put this question in context, it is necessary to consider the legislative history of s. 267.8 together with this court's decision in *Cugliari v. White*.

#### **(b) Compensation Under the Insurance Act**

17 In his *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*, vol. 1 (Ministry of the Attorney General and Ministry of Financial Institutions, 1988) at pp. 428-44, Justice Coulter Osborne recommended that the collateral benefits rule be abolished. He proposed that "collateral benefits in the nature of indemnity payments from either public or private sources... be deducted from the relevant component of a tort award made to the injured person so that there will be no overcompensation" (pp. 442-43).

18 After the Osborne report, the Ontario government brought in a succession of statutory regimes for compensating persons injured in car accidents. Three of these regimes that have dealt with the deductibility of collateral benefits are relevant to the issues on this appeal: Bill 68, the Ontario Motorist Protection Plan (OMPP), which applied to car accidents between October 23, 1989 and December 31, 1993; Bill 59, which governs this appeal, and applied to car accidents after November 1, 1996 and before October 1, 2003;<sup>2</sup> and Bill 168, which was passed in 2002.

#### **(i) Bill 68, OMPP**

19 Section 267(1)(c), enacted under Bill 68, modified the collateral benefits rule. It provided that damage awards be reduced by payments for loss of income:

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 motor vehicle shall be reduced by,

.....

(c) all payments that the person has received or that were or are available for loss of income under the laws 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; ...

(ii) *Bill 59*

20 The car accident in which Ms. Demers was injured occurred in 1999, and thus falls under the Bill 59 regime. Section 267.8(1)2, the provision in issue on this appeal, was enacted as part of Bill 59 and further modified the collateral benefits rule. For convenience I again set it out:

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:

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.

21 As is evident from comparing the two provisions, s. 267.8(1)2 amended s. 267(1)(c) of the OMPP in three ways:

- "Loss of earning capacity" is added to subparagraph 2 so that damages are to be reduced by payments for loss of income or loss of earning capacity;
- Subsection (1) now identifies the type of damages to which the reduction applies - damages for income loss and loss of earning capacity;
- The phrase "in respect of" is added to subparagraph 2 so that only payments the plaintiff receives in respect of the incident are to be deducted.

(iii) *Bill 168*

22 Under Bill 168, O. Reg. 461/96 was amended by O. Reg. 312/03 in 2002. Section 5.2 of the amendment expressly eliminated the collateral benefits rule (or insurance exception) for CPP disability benefits. Section 5.2 states:

5.2 For the purposes of paragraph 2 of subsection 267.8(1), paragraph 2 of subsection 267.8(9) and subclause 267.8(12)(a)(ii) of the Act, payments in respect of an incident for income loss or loss of earning capacity under an income continuation benefit plan shall be deemed to include the following payments, if the incident occurs on or after October 1, 2003:

1. Payments of disability pension benefits under the *Canada Pension Plan*. ...

23 Thus, if the accident in which Ms. Demers was injured had occurred after the beginning of October 2003, her CPP disability benefits would have been deductible. The effect, if any, of this amendment was an important issue before the motion judge and on this appeal.



(iv) *Cugliari v. White*

24 In *Cugliari v. White*, this court addressed the question whether CPP disability benefits should be deducted from an injured plaintiff's damages award. The accident giving rise to the litigation occurred in 1990 and, therefore, was governed by the OMPP (Bill 68). However, this court's decision was rendered in 1998, during the currency of the Bill 59 regime.

25 Charron J.A., writing for the panel, held that the CPP disability benefits were not deductible either at common law or under s. 267(1)(c) of the Act. She recognized that the purpose of s. 267(1)(c) was to narrow the scope of the collateral benefits rule. She grounded her decision in the distinction drawn by McLachlin J. in *Cooper v. Miller* between indemnity and non-indemnity payments. As she rightly said, at p. 647 of her reasons, "the words 'payments ... for loss of income' [in s. 267(1)(c)] do import a notion of indemnification." However, she held that CPP disability benefit payments are non-indemnity payments: "the conditions for eligibility do not require that the recipient be employed at the time of the disability or that the recipient demonstrate a pecuniary loss." Therefore, deducting these benefits would not advance "the legislative purpose of eliminating double recovery" (at p. 647).

26 Having concluded that the CPP disability benefits were not deductible under s. 267(1)(c), Charron J.A. then added at p. 648: "CPP disability benefits can arguably be seen to compensate for the loss of earning capacity but they cannot reasonably be construed as intending to indemnify a disabled person for loss of income." This additional comment, perhaps made with an eye to the wording of s. 267.8(1)2, became a focal point of the present appeal.

#### D. The Issues

##### ***(a) Are the CPP Disability Benefits Ms. Demers Receives Deductible From Payments for Loss of Earning Capacity?***

27 I do not accept the appellants' argument that Charron J.A.'s comment in *Cugliari* controls the answer to this question. Her comment was obiter as the case before her was decided under the previous statutory regime, the OMPP. That regime did not provide for the deductibility of payments for loss of earning capacity. Because the panel did not have to decide this question, Charron J.A. did not analyse whether CPP disability benefits should be deducted from awards for loss of earning capacity.

28 Equally, however, I do not consider that my own reasons in *Kosanovic v. Wawanese Mutual Insurance Co.* (2004), 70 O.R. (3d) 161 (Ont. C.A.), control the answer to this question. *Kosanovic* was decided under the Bill 59 regime. However, the main issue in that case was whether the plaintiff was required to deduct disability benefits received under a private insurance policy from the amount he received under the unidentified driver coverage in the standard automobile policy — we said no. Although I did refer to s. 267.8(1)2 of the Act, and *Cugliari*, I did not consider the deductibility of payments for loss of earning capacity.

29 Nonetheless, I would answer no to the question whether CPP disability benefits should be deducted from payments for loss of earning capacity for either of two reasons. The first reason rests on the principle that clear and unambiguous legislative language is required to change common law rights. The addition of the term "loss of earning capacity" in the Bill 59 regime does not clearly and unambiguously change the non-deductibility of CPP benefits at common law.

30 The second reason I would answer no is that CPP disability benefits are not paid "in respect of the incident"; they are paid in respect of Ms. Demers' disability. Thus, on the wording of s. 267.8(1)2 no deduction is required.

*(i) The Addition of "Loss of Earning Capacity" in s. 267.8(1)2 Does Not Clearly and Unambiguously Change the Common Law*

31 As I have discussed, at common law CPP disability benefits are not deductible from a tort award. They fall within the private insurance exception. The legislature can, of course, change the common law. However, as Charron J.A. noted in *Cugliari* at para. 20: "The common law rights which existed prior to the enactment of s. 267 should only be displaced by clear and unambiguous language."

32 This statement reflects one of the presumptions of legislative intent: in interpreting a statute, we start from the presumption that the legislature does not intend to change the common law: see Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 244-45. McLachlin J. gave effect to this presumption in her dissenting reasons in *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.), at para. 73, dealing with the self-defence provisions of the *Criminal Code*. She wrote: "To effect such a significant change, Parliament would have made its intention clear. This it did not do."

33 I take a similar view of s. 267.8(1)2. If the legislature intended to change the non-deductibility of certain benefits, such as CPP disability benefits, it did not make that intention clear. The addition of "loss of earning capacity" does not demonstrate a clear intention to change to the common law because the jurisprudence has not treated the phrase in a consistent way. Some cases have differentiated loss of earning capacity from loss of income; but others have treated the terms interchangeably.

34 An example of a case where the two phrases have been distinguished is the decision of the Nova Scotia Court of Appeal in *M. (L.M.) v. Nova Scotia (Attorney General)*, 2011 NSCA 48, 303 N.S.R. (2d) 243 (N.S. C.A.), at para. 63. There, the court endorsed the following excerpt from the trial judge's reasons:

There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income." This point was discussed in *Exide Electronics Ltd. v. Webb* (1999), 177 N.S.R. (2d) 147., where Freeman J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in a situation where a plaintiff can return to work, but with "a disability that restricts the scope of other employment that might become available in the future." By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbot v. Sharpe*, 2007 NSCA 6, Saunders J.A. said, at para. 156: "... this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income." In my view "loss of earning capacity" is the relevant approach in the present case.

35 On this view, damages for loss of earning capacity compensate for the loss of a capital asset. They do not depend on proving a pecuniary loss. Instead, they are triggered by a particular disability, which impairs the ability to work. In this sense, CPP disability benefits tend to duplicate damages for loss of earning capacity. Neither requires proving a pecuniary loss; both depend on proving a disability. As the one tends to duplicate the other, the one should be deductible from the other.

36 However, this view is not uniformly held. This court treated loss of income and loss of earning capacity interchangeably in *Walker v. Ritchie* (2005), 25 C.C.L.I. (4th) 60 (Ont. C.A.). So too did the British Columbia Supreme Court in *MacKenzie v. Rogalasky*, 2011 BCSC 54 (B.C. S.C.).

37 In his text, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Thomson Canada Ltd., 1996), Ken Cooper-Stephenson summarized much of the case law when he wrote at p. 138:

As far as concerns lost income, the courts fluctuate between the notion of "loss of earnings" and "loss of earning capacity", not for the most part intending any aspect of the substance of an assessment to depend on the particular wording, since damages are universally quantified on the basis of what the plaintiff *would have*, not what he or she *could have* earned absent the injury.

As the motion judge noted, McLachlin J. cited this exact excerpt with approval in her reasons in *B. (M.) v. British Columbia*, 2003 SCC 53, [2003] 2 S.C.R. 477 (S.C.C.), at para. 49.

38 Cooper-Stephenson elaborated on the failure of the courts to distinguish between loss of income and loss of earning capacity at 138-9:

And if there were real substance to the terminological debate, something significant could have been made of it in *Ratyck v. Bloomer* on the issue of the deductibility of collateral benefits, but nothing was: the basic principle is that damages for lost working capacity are reduced by actual benefits received — indicating that the notion of a "capacity" and "actual moneys" are considered *in parmi materia*. If anything, the judgments of both McLachlin and Cory JJ. in *Ratyck* suggest that "loss of earnings" or "loss of income" is the preferable terminology. They support the notion that the award is being made for the loss of a stream of income rather than an abstract "capacity". [Footnotes omitted.]

39 He eventually concluded at 214:

All this, however, is terminology. And the terminology, as between "loss of earnings" and "loss of earning capacity" is used "quite indiscriminately, as if nothing would depend on their choice".

40 On this view, an award for loss of earning capacity, like an award for loss of income, compensates for an actual pecuniary loss. It is an indemnity payment. As the CPP disability benefits are non-indemnity payments they should not be deducted.

41 My point here is not to come down on one side or the other of this debate. What the debate shows is that the addition of the term "loss of earning capacity" in s. 267.8(1)2 did not clearly and unambiguously change the common law. Non-indemnity payments such as CPP disability benefits, therefore remain non-deductible under Bill 59.

42 That is where the amendment to the regulation in 2002 becomes important. That amendment removes any doubt about the deductibility of CPP benefits. They are now expressly deductible.

43 I agree with the appellants that a mere amendment of a regulation does not imply anything about the previous state of the law, and especially does not imply that the previous state of the law was different: see *Legislation Act, 2006*, S.O. 2006, C. 21, Sched. F, s. 56. Equally, however, the court should not presume the law is the same despite the amendment: see *Vijeyekumar v. State Farm Mutual Automobile Insurance Co.* (1998), 38 O.R. (3d) 590 (Ont. Gen. Div.) at p. 610; aff'd (1999), 44 O.R. (3d) 545 (Ont. C.A.). The amendment standing alone is a neutral consideration. In this case, however, it turns an unclear and ambiguous legislative intent into a clear and unambiguous legislative intent. As Bill 59 did not clearly and unambiguously change the non-deductibility of CPP disability benefits at common law, I would, on this ground alone, dismiss the appeal.

(ii) *CPP Disability Benefits are Not Paid to Ms. Demers "In Respect of the Incident"*

44 To be deductible under s. 267.8(1)2 payments must be "in respect of the incident". I agree with Ms. Demers' submission that the CPP disability benefits she receives are payments in respect of her disability, not payments in respect of the incident — that is the accident for which she claims damages for her personal injuries. On this ground too, I would dismiss the appeal.

45 This ground relies on the reasons of Iacobucci J. in *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921 (S.C.C.). In that case, an inmate while working at a federal penitentiary, sustained serious personal injuries for which he sued the Crown in tort. He also qualified for and received CPP disability benefits, which were paid to him out of the Consolidated Revenue Fund. In the light of the inmate's receipt of CPP benefits, the court had to decide whether his tort claim was barred by s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50. That section provided:

9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

46 The Supreme Court decided that s. 9 did not bar the inmate's claim. The decision turned on the meaning of the words "in respect of": in other words, were the CPP disability benefits paid "in respect of the ... injury, damage or loss" suffered

by the inmate? Iacobucci J. acknowledged at para. 20 that "in respect of" is a broad phrase. It "signals an intent to convey a broad set of connections". Yet, it is not a phrase "of infinite reach" (para. 22). It has to be interpreted in its context.

47 In s. 9 of the federal statute, the phrase "in respect of" is tied to a list of specific events: death, injury, damage or loss. Iacobucci J. concluded that the tort claim would be barred only if the pension was given for the same event for which the tort claim was made. He held at para. 31 that CPP benefits were not contingent on the events specified in s. 9, but depended solely on the disabled condition of a qualified contributor:

Keeping in mind that s. 9 refers to pensions and compensations "in respect of" particular kinds of events, I am of the opinion that disability benefits under the CPP do not fall within its scope on the ordinary meaning of the words. I concede that the words "in respect of" may encompass more than direct compensation for loss. However, I do not believe that the CPP makes its payments on the same basis as s. 9 seems to require. That is, s. 9 contemplates payment in some manner contingent on the occurrence of an event of "death, injury, damage or loss". A CPP disability benefit, by contrast, is not contingent on events at all, but on the present disabled condition of a qualified contributor under 65 years of age who makes an application for payment. Whether or not the present serious and long-term disability that entitles an otherwise qualified contributor to receive CPP disability benefits happens to be the result of "death, injury, damage or loss" is not relevant to the determination of eligibility. The only relevant question, assuming a person has met the conditions of eligibility with respect to age and contribution status, is the status of the applicant as disabled at the time the application is made.

48 The context in which the phrase "in respect of" is found in s. 267.8(1)2 of the *Insurance Act* is similar to its context in s. 9 of the *Crown Liability and Proceedings Act*. The phrase is tied to the incident, in this case the car accident in which Ms. Demers was injured. Her CPP benefits, as in *Sarvanis*, are not tied to the incident. Instead, they depend on her disability and on meeting the qualifications for receiving these benefits. Accordingly, I conclude that CPP disability benefits are not paid to Ms. Demers "in respect of the incident" and therefore are not captured by s. 267.8(1)2.

***(b) Are the HOOP Disability Benefits Ms. Demers Receives Deductible From Payments for Loss of Earning Capacity?***

49 The analysis of the question whether HOOP disability benefits are deductible does not differ from the analysis for CPP disability benefits. Thus, Ms. Demers's HOOP benefits, too, are not deductible from payments for loss of earning capacity.

50 There is one distinction between the two benefits. Unlike the case with CPP disability benefits, there is no amending regulation to now make HOOP benefits deductible. However, the absence of an amendment does not change the analysis.

**E. Conclusion**

51 I agree with the motion judge that neither the CPP disability benefits nor HOOP disability benefits that Ms. Demers receives are deductible under s. 267.8(1)2 of the *Insurance Act* from any tort award for loss of income or loss of earning capacity. It is, therefore, unnecessary to determine whether if these benefits were deductible, the deduction would be net or gross of income tax.

52 I would dismiss the appeal, with costs in the agreed amount of \$8,500 plus applicable taxes.

***E.A. Cronk J.A.:***

I agree.

***R.A. Blair J.A.:***

I agree.

*Appeal dismissed.*

Footnotes

- 1 The motion judge also determined that the interest paid to Ms. Demers on overdue statutory income replacement benefits is not deductible from an award of damages for income loss and loss of earning capacity. This determination has not been appealed.
- 2 Bill 164, which applied to car accidents between January 1, 1994 and October 31, 1996, precluded injured persons from suing the owner or occupant of a car for economic loss. As the motion judge pointed out at para. 7 of his reasons, "the issue of collateral benefits therefore did not arise under Bill 164 accidents."

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