

CITATION: McCurdy, et al. v. Maille, et al., 2023 ONSC 6857
COURT FILE NO.: CV-16-00001478-0000
DATE: 20231205

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Randy Dale McCurdy, Sandra Jean McCurdy, Barry McCurdy, and Jackson McCurdy, Mya McCurdy, and Olivia McCurdy, by their Litigation Guardian, Sandra Jean McCurdy, Plaintiffs

AND

Charles Maille, The Corporation of the United Counties of Stormont, Dundas and Glengarry and 809298 Ontario Inc., Defendants

BEFORE: Justice Spencer Nicholson

COUNSEL: V. Edgar and A. Duggan, for the Plaintiffs

B. Sunohara and A. Colarossi, for the Defendants, Charles Maille and 809298 Ontario Inc.

HEARD: March 27, 28, 29, 30, 31, April 3, 4, 5, 6, 11, 12, 13 and May 25, 2023

REASONS ON POST-TRIAL MOTION RE:
COLLATERAL BENEFITS

NICHOLSON J.:

- [1] The plaintiff, Randy McCurdy, was involved in a significant motor vehicle accident that occurred on February 24, 2016. The specifics of his injuries are not important for the purpose of this motion, but Mr. McCurdy was determined to be catastrophically impaired by his accident benefits insurer. His most prominent injuries included a traumatic brain injury and orthopaedic injuries.
- [2] The remaining plaintiffs are Mr. McCurdy's wife and children. Mr. McCurdy's brother, Barry, died before the trial took place and his claim was discontinued.
- [3] The defendants, Charles Maille and 809298 Ontario Inc., admitted liability for the accident. The claims as against the municipalities were discontinued.
- [4] Thus, the only issue during this jury trial was the damages, if any, to which the plaintiffs were entitled. The plaintiffs did not pursue future care costs or home maintenance/handyman claims in this trial.
- [5] On April 13, 2023, the jury returned a verdict with the following awards:

In respect of Randy McCurdy

Non-Pecuniary General Damages	\$ 245,000.00
Past Loss of Income	\$ 375,301.00
Future Loss of Income	\$1,362,887.00

In respect of Sandra McCurdy (wife)

Loss of care, guidance and companionship	\$ 65,000.00
Compensation for Services Rendered	\$ 35,000.00

In respect of Jackson (child)

Loss of care, guidance and companionship	\$ 30,000.00
Compensation for Services Rendered	\$ 6,000.00

In respect of Mya (child)

Loss of care, guidance and companionship	\$ 30,000.00
Compensation for Services Rendered	\$ 6,000.00

In respect of Olivia (youngest child)

Loss of care, guidance and companionship	\$ 15,000.00
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- [6] In my view, the jury's awards were supported by the evidence led at trial.
- [7] The proceedings were adjourned to May 25, 2023, to deal with matters such as collateral benefits and deductibles.
- [8] On the return date, it was agreed that no deductible applied to the award of non-pecuniary general damages made to Randy McCurdy. It was agreed that no deductible applied to the award under the *Family Law Act* ("FLA") made to Sandra McCurdy. It was also agreed that the *FLA* awards made to each of the children were subject to a deductible in the amount of \$22,183.63.
- [9] The parties agreed that pre-judgment interest on the net awards was \$13,762.96 in respect of Randy McCurdy, \$4,371.36 for Sandra McCurdy and \$776.14 for each of Jackson and Mya.
- [10] It was further agreed that Mr. McCurdy had received CPP Disability benefits prior to trial in the amount of \$96,435.17 which were to be deducted from the award for past loss of income. It was also agreed that Mr. McCurdy had received income replacement benefits

in the amount of \$4,198.00 which were also to be deducted from the past loss of income award.

- [11] In respect of future CPP disability benefits, it was agreed that these benefits were subject to the assignment provisions of the *Insurance Act*.
- [12] Mr. McCurdy also received insurance benefits from Manulife in the amount of \$258,000 up to the time of trial. He may be entitled to receive such benefits into the future. The parties do not agree on whether or not the defendants are entitled to deduct this sum from the income loss awards and/or are entitled to an assignment, or trust claim, in respect of the benefits payable into the future.
- [13] Accordingly, the purpose of these Reasons is to determine whether or not the benefits received by Mr. McCurdy from Manulife are subject to the provisions of s. 267.8 of the *Insurance Act*.

How the Income Loss was Presented at Trial:

- [14] During her opening statement, plaintiffs' counsel told the jury that Mr. McCurdy had suffered a past loss of income of over \$100,000 *after* deducting collateral benefits. She also told the jury that they would hear that his future income loss to age 65 would be over \$979,000 *after* taking into account the present value of his collateral benefits. These deductions included the Manulife benefits.
- [15] At some point early in the plaintiff's case, I expressed concern about the manner in which the income loss claim was being presented to the jury. It was my view that it had to be clear how the jury was dealing with income loss so that there was no ambiguity with respect to its award. I noted the case of *Brown v. Campbell*, 2011 ONSC 4984, 109 O.R. (3d) 306, in which the court was left to speculate as to whether the jury had already made deductions in respect of benefits received by the plaintiff.
- [16] I was advised that the plaintiffs' economic loss expert would make it clear for the jury how they were to assess the plaintiff's income loss. The economic loss expert testified as to the gross income loss, and then told the jury to make deductions for collateral benefits. In respect of the future income loss, the economic loss expert testified as to what the present value of the future collateral benefits would be and then told the jury that those should also be deducted from its award.
- [17] I note in doing so, the economic loss expert did deduct the value of the Manulife benefits.
- [18] Following the plaintiffs' expert's testimony, I again raised my concern with counsel. It was my view that the jury should be instructed to determine Mr. McCurdy's past and future income loss without regard to any collateral benefits. It is the trial judge's responsibility to make the appropriate deductions, or make a trust or assignment order, following the trial.

I cited *Malgara v. Vukojevic*, 2014 ONSC 6604 and *Girao v. Cunningham*, 2020 ONCA 260, at para. 90.

- [19] There is obviously a significant difference whether the present value of the future Manulife benefits is deducted from the jury award or held in trust or assigned to the defendants as there is no guarantee that the plaintiff will actually receive those future Manulife benefits.
- [20] In my instructions to the jury, I was clear that both past and future income loss was to be assessed on a “gross” basis, without any deductions being made on account of any benefits that the plaintiff had already received or might receive in the future. I crafted jury questions that included a box for the jury foreperson to check off confirming that the jury had not made any deductions for collateral benefits.
- [21] I am accordingly confident that the jury awarded past and future income loss without making any deductions for collateral benefits.
- [22] Given how the evidence was presented at trial — that the Manulife benefits were deductible — I was surprised by the position taken by the plaintiffs when the matter returned before me. I was advised that plaintiffs’ counsel only became aware that the benefits may not be deductible when they learned after the trial that Manulife had not deducted the CPP benefits in determining the amount of disability benefits payable to Mr. McCurdy.
- [23] No estoppel argument was made by the defendants.

Relevant Provisions of the Manulife Policy:

- [24] The parties have produced the Manulife Policy. Mr. McCurdy purchased this policy on October 22, 2011.
- [25] I note that Mr. McCurdy, who was self-employed as a truck driver, paid an annual premium of \$2,928.38 for the policy. That premium secured coverage for:
- “24 Hour Compensation (P)”
 - “24 Hour Accident Disability Extension”
 - Accidental Death and Dismemberment
 - Accident Excess Medical
 - Return of Premium
- [26] The “24 Hour Compensation (P) Benefits Schedule” includes “Accident Total Disability” benefits. This coverage provides for the payment of \$3,000 per month for a maximum of 24 months. There were several other types of benefits listed under this schedule, none of which are relevant in this analysis.
- [27] Under “24 Hour Accident Disability Extension Benefit Schedule”, “Accident Total Disability” benefits were payable in the amount of \$3,000 per month, after the Primary

Insured had received 24 consecutive monthly total disability payments. These benefits were payable to a maximum age of 65.

[28] Accordingly, the Manulife policy appears to provide for what is commonly considered short term disability benefits for the first 24 months, and long-term benefits thereafter, payable to age 65.

[29] The policy includes “General Definitions”. These include the following:

- Accident or accidental means a sudden, unexpected, unforeseeable, unavoidable external event.
- Employed means actively engaged in an occupation for compensation or profit at least 30 hours per week.
- Injury means bodily harm resulting directly from an Accident and independent of all other causes including Sickness.
- Other Source means any individual or group insurance policy, any government law or plan, any workers compensation plan, any salary or wages continuance plan provided by an employer, or any disability pension plan.

[30] “24 Hour Compensation (P)” coverage contains further definitions and conditions. I note the following:

- Total Disability or Totally Disabled means the Primary Insured, as a result of a medically determinable injury, is under the regular care and attendance of a Physician, is following the recommended treatment and;
 - a) if Employed at the time the injury occurred, is wholly and continually unable to engage in his or her own occupation and is not gainfully employed in any occupation for compensation; or
 - b) if not Employed at the time the injury occurred, is wholly and continually unable to perform most of his or her routine daily activities.
- If the Primary Insured became Totally Disabled within 90 days of an Accident, due to injury sustained in that Accident, which occurred while coverage was in effect, the Company would pay the monthly benefit specified in the 24 Hour Compensation (P) Benefit Schedule. These Benefits were payable for a maximum of 24 months or until the Primary Insured ceased to be Totally Disabled, whichever occurred first.

[31] The 24 Hour Compensation coverage contains a provision entitled “Accident Disability Benefit Limitations”. That provision provided as follows:

- a) If the Primary Insured is Employed on the date he or she became Totally Disabled, the aggregate maximum Accident Total Disability Benefit amount payable shall not exceed the least of:
- i) the combined amount(s) specified in any Benefit Schedule for such Coverage; or
 - ii) 75% of the Primary Insured's pre-disability income and/or 1% of Business Income, as determined in accordance with Company guidelines; or
 - iii) \$6,000.00.
- b) If the Primary insured is not Employed on the date he or she became Totally Disabled, the aggregate maximum Accident Total Disability Benefit amount payable shall not exceed the lesser of:
- i) the combined amount(s) specified in any Benefit Schedule for such Coverage; or
 - ii) \$2,000.00.

[32] The 24 Hour Compensation (P) coverage did have a provision permitting Integration with Other Sources where the amount of the monthly benefit payable, when combined with any other similar Coverage was greater than \$2,000.00 for Accident Total Disability. However, the amount of the monthly benefit payable, after deduction for Other Sources, would not be less than \$2000.00 for Accident Total Disability.

[33] Within the same coverage, under "Accident Total Disability Benefit Adjustment", if the Primary Insured's income on the date of Disability had decreased from the amount stated on the application, such that the Total Disability benefit was higher than could be supported by the new level of income, the policy could be amended to adjust the benefit amount and reduce the premium. However, the combined aggregate benefit would not be adjusted to an amount less than \$2,000.00 for Accident Total Disability, regardless of income.

[34] There are similar Definitions for "24 Hour Accident Disability Extension", as follows:

- Total Disability or Totally Disabled means the Primary insured, as a result of a medically determinable injury, is under the regular care and attendance of a Physician, is following the recommended treatment and;
 - a) if Employed at the time the injury occurred,
 - (i) has already received 24 consecutive monthly Total Disability payments;

- (ii) is, for the next 36 months, wholly and continually unable to engage in his or her own regular occupation and is not gainfully employed in any occupation for compensation; and
- (iii) is, thereafter, wholly and continually unable to engage in his or her own regular occupation or any occupation or employment for compensation for which he or she is reasonably fitted by education, training or experience and is not gainfully employed in any occupation for compensation; or

- b) if not Employed at the time the injury occurred, has already received 24 consecutive monthly Total Disability payments and is thereafter unable to perform a significant number of his or her routine daily activities.

[35] Again, there are limits under this coverage on the amount of the aggregate maximum monthly benefit amount payable. That amount for employed individuals shall not exceed the least of:

- i) the combined amount(s) specified in any Benefit Schedule for such Coverage; or
- ii) 75% of the Primary Insured's pre-disability income and/or 1% of Business Income as determined according to Company guidelines; or
- iii) \$6,000.00.

[36] The 24 Hour Accident Disability Extension benefits also include a provision such that if the Primary Insured's income on the date of disability had decreased such that the Total Disability benefit was higher than could be supported by the new level of income, the policy could be amended to adjust the benefit amount and reduce the premium.

[37] The 24 Hour Accident Disability Extension benefits also included an Integration with Other Sources clause.

[38] The Application for insurance completed by Mr. McCurdy was also produced. Section 2 required Mr. McCurdy to be working 30 or more hours per week to be eligible to apply for accident and sickness disability benefit amounts exceeding \$1,000 and for any amount of accident or sickness disability extension. In Section 5, the eligible monthly benefit was determined by taking the gross annual personal earned income and multiplying it by 75%.

[39] Counsel for the plaintiffs points out that the Manulife Policy does not contain any provision that reduces the amount of the monthly total disability benefit for income earned while in receipt of the benefits. Arguably, however, earning *any* compensation from gainful employment in any occupation would disentitle an insured to any benefits.

[40] The Manulife policy does not contain any right of subrogation.

Legal Analysis:

[41] It is the goal of tort law to restore a plaintiff to the position that he or she would have been in had the negligent act or omission not occurred in so far as money can do so. The fundamental principle is that a plaintiff is entitled to recover the full extent of his loss, but no more. However, the common law rule provided that payments received under an insurance policy paid for by the plaintiff were not deductible from tort awards for loss of income, even if it resulted in “over-compensation” of the plaintiff. Defendants were not entitled to benefit from the plaintiff’s foresight in purchasing insurance. This is the “private insurance exception” (see: *Cunningham v. Wheeler*, [1994] 1 SCR 359 and *Demers v. Monty*, 2012 ONCA 384, 111O.R. (3d) 42, at paras. 11 and 12).

[42] Section 267.8 of the *Insurance Act* is intended to address double recovery and the private insurance exception. The relevant portion of s. 267.8, dealing with income loss and loss of earning capacity, is as follows:

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.

...

(9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:

1. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of income loss or loss of earning capacity.

2. All payments in respect of the incident that the plaintiff receives after 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 receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.

...

(10) A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages.

...

(12) The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,

(a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,

(i) for statutory accident benefits in respect of income loss or loss of earning capacity,

(ii) for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan,

(iii) under a sick leave plan arising by reason of the plaintiff's occupation or employment,

...

(b) the plaintiff who recovered damages in the action co-operate with the defendants or the defendants' insurers in any claim or proceeding brought by the defendants or the defendants' insurers in respect of a payment assigned pursuant to clause (a).

(13) Subsection (9) no longer applies if an order is made under subsection (12).

[43] The Manulife benefits in issue are not payable under the statutory accident benefits schedule. Accordingly, the issue is whether the Manulife benefits are payments in respect

of the incident “for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan”.

[44] *Regulation 461/96* to the *Insurance Act* provides guidance to interpreting s. 267.8. Section 5.2 of that regulation provides as follows:

5.2 (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 are deemed to include if the incident occurs on or after September 1, 2010, the payments for loss of income under an income continuation benefit plan described in clause 3(7)(d) of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule—Effective September 1, 2010), made under the Act.

[45] Clause 3 (7)(d) of *Ontario Regulation 34/10* states as follows:

3 (7) For the purposes of this Regulation,

(d) payments for loss of income under an income continuation benefit plan are deemed to include,

- (i) payments of disability pension benefits under the Canada Pension Plan,
- (ii) periodic payments of insurance, irrespective of whether the contract for the insurance provides for a waiting period, deductible amount or similar limitation or restriction and irrespective of whether the contract is paid for in whole or in part by the employer, if the insurance is offered by the insurer,

(A) to persons who are employed while the contract for the insurance is in effect, and

(B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person’s income from employment.

[46] The Ontario Court of Appeal, in *Nemchin v. Green*, 2021 ONCA 238, described the legislative purpose of s. 267.8 of the *Insurance Act* as follows, at para. 22:

[22] It is well established that the legislative purpose of s. 267.8 is to promote fair compensation to injured plaintiffs and prevent double recovery. As this court observed in *Cadieux v. Cloutier*, 2018 ONCA 903, 429 D.L.R. (4th) 468, leave to appeal refused [2019] S.C.C.A. No. 63, at para. 17: “Section s.267.8 of the *Insurance Act* contains provisions designed to address [the overlap between tort damages and collateral benefits] and to prevent double recovery. It reflects the

principle that victims should be fairly compensated, but not over-compensated.” See also: *Carroll v. McEwen*, 2018 ONCA 902, 429 D.L.R. (4th) 443, at para. 38; *Cobb v. Long Estate*, 2017 ONCA 717, at para. 52; *El-Khodr v. Lackie*, 2017 ONCA 716, 416 D.L.R. (4th) 189, at para. 33, leave to appeal refused, [2017] S.C.C.A. No. 461. ...

- [47] The *Cadieux*, *Carroll*, *Cobb* and *El-Khodr* cases, referenced in *Nemchin*, were all cases involving statutory accident benefits. Those cases, therefore, did not deal with paragraph 2 of subsection 267.8 (1), paragraph 2 of subsection 267.8 (9) or subclause 267.8 (12)(a)(ii) of the *Insurance Act*.
- [48] *Nemchin* involved long-term disability benefits paid by Sun Life Assurance. The Court of Appeal implicitly accepted the trial judge’s finding that these benefits were payable under an income continuation plan and presumably no quarrel was taken with that finding by the parties.
- [49] The trial judge’s decisions with respect to assigning the long-term disability benefits in *Nemchin* are found at *Nemchin v. Green*, 2018 ONSC 2185, 140 O.R. (3d) 668, and *Nemchin v. Green*, 2019 ONSC 6243. A review of the 2018 decision indicates that there was no issue taken by either party that the LTD benefits were deductible. At para. 15 of the 2019 decision, the trial judge stated:
- [15] The parties to this action are dealing with damages for loss of income and payments under an income continuation benefit plan (s. 267.8(9), item 2). The policy of LTD insurance with Sun Life is such a plan.
- [50] Thus, the trial judge did not conduct any analysis as to whether the LTD benefits were payments in respect of the incident for income loss or loss of earning capacity under an income continuation benefit plan. I note that I am not questioning that determination, rather pointing out that the case does not assist me in determining whether the Manulife benefits are similarly deductible.
- [51] The plaintiffs argue in the case before me that Accident Total Disability benefits are available under the Manulife policy to an insured who was not employed at the time of the accident. Thus, the plaintiffs argue that those benefits would be akin to non-earner benefits under the Statutory Accident Benefits Schedule that have been held not to be deductible (see: *Kolapully v. TTC et al.*, 2022 ONSC 6024).
- [52] In their factum, the plaintiffs state that whether or not Mr. McCurdy was employed at the time of the accident, he would have received the same amount of total disability benefits--\$3,000 per month. However, that is not the case. In the event that the primary insured is not employed on the date he became totally disabled, “the aggregate maximum amount of the accident total disability benefit shall not exceed the lesser of:

- i) the combined amount(s) specified in any Benefit Schedule for such Coverage (in this case \$3,000); or
- ii) \$2,000.00.”

[53] Accordingly, there is a difference in the amount of benefit that Mr. McCurdy would have received had he not been employed at the time of the accident. He would have only been entitled to the sum of \$2,000 per month, being the lesser of the two amounts. Thus, his status as “employed” at the time of the onset of disability mattered.

[54] More importantly, Mr. McCurdy *was* employed at the time of the accident. In order to promote the purpose of the legislation, it is my view that it is the benefits that Mr. McCurdy was actually receiving that must be considered, not any of the other benefits that might have been available to Mr. McCurdy under the policy under a different scenario. The benefits that Mr. McCurdy was receiving depended upon his being employed at the time his disability arose. Had he not been employed, Mr. McCurdy would not have been eligible to receive benefits in the amount of \$3,000, but only \$2,000. Whether or not the \$2,000 per month would have been deductible is not before me. *Kolapully* does not assist the plaintiff in this case.

[55] The issue comes down to interpreting Clause 3 (7)(d) of *Ontario Regulation 34/10*, in a manner that promotes the purpose of the legislation as stated above. The Manulife benefits were clearly “periodic payments”. Thus, the issue is whether:

- (A) the insurance was offered by Manulife to persons who are employed while the contract for insurance was in effect; and
- (B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person’s income from employment.

[56] The conditions under both (A) and (B) must be satisfied for the benefits to be deemed to be payments for loss of income under an income continuation benefit plan.

[57] I note that for accidents occurring prior to September 1, 2010, the deeming provision under s. 5.2(1) of *Regulation 461/96* included the following language:

- ...
- 2. Periodic payments of insurance, if the insurance is offered by the insurer,
 - i. only to persons who are employed *at the time the contract of insurance is entered into*, and
 - ii. only on the basis that the maximum benefit payable is limited to an amount calculated by reference to the insured person’s income from employment. (emphasis added by me)

[58] Thus, periodic payments of insurance were deductible if the insurance was offered to persons who were employed at the point in time that the contract of insurance was entered

into. For accidents occurring after September 1, 2010, the deeming provision was changed to include those who were employed while the insurance was in effect and not just at the time that the insurance contract was entered into.

- [59] Mr. McCurdy was employed both at the time that the policy was obtained and at the time that Mr. McCurdy's disability arose. From the application it appears that the Manulife benefits that Mr. McCurdy received were only offered to persons that were employed. It was a condition of eligibility for those particular benefits. Unemployed persons could also apply for certain coverages, and certain benefits were available to unemployed persons if they met the test of total disability. However, the legislation does not require that the benefits be exclusively offered to employed persons, rather the legislation requires that the insurance be offered to persons who are employed.
- [60] I find that condition (A) of the regulation has been satisfied. Amongst those to whom Manulife offered the insurance were persons who were employed while the policy was in effect. In fact, Mr. McCurdy was employed at the time he applied for the insurance and at the time his disability arose.
- [61] That interpretation is consistent with the purpose of the legislation—to limit double recovery but in a manner that provides fair compensation to injured plaintiffs.
- [62] Part (B) of the test requires that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment. "With reference to" implies some connection between the insured person's income from employment and the amount of benefit but does not necessarily require that a mathematical formula need be used to calculate the maximum benefit.
- [63] The Manulife Policy caps the monthly benefit at the least of:
- i. the combined amount(s) specified in any Benefit Schedule for such Coverage (which in this case is \$3,000);
 - ii. 75% of the Primary Insured's pre-disability income and/or 1% of Business Income, as determined in accordance with Company guidelines; or
 - iii. \$6,000.00.
- [64] Thus, under paragraph (ii), the insured person's pre-disability income can limit the maximum benefit payable, where 75% of the person's pre-disability income is less than the amount under paragraph (i).
- [65] Furthermore, it is important that the Manulife Policy contains a benefit adjustment provision. That provision states that if the insured person's income on the date of disability has decreased from the amount stated on the application such that the total disability benefit is higher than can be supported by the new level of income, the policy may be amended to adjust the benefit amount and reduce the premium. Accordingly, the maximum amount of

the monthly benefit is calculated with reference to the insured person's employment income.

- [66] Finally, the application for insurance required Mr. McCurdy to set out his personal income for the purpose of determining the eligible monthly amount that he could apply for, if it were to exceed \$2,000 per month. The application, in section 2, required Mr. McCurdy to be working 30 or more hours per week in order to be eligible to apply for accident and sickness disability benefits exceeding \$1,000 and for *any* amount of Accident or Sickness Disability Extension.
- [67] The defendants refer to *17-000751 v. Economical Mutual Insurance Company*, 2018 CanLII 81896 (ON LAT), a decision of an Adjudicator for Statutory Accident Benefits under the Licence Appeal Tribunal. In that case, the issue was whether certain disability benefits were deductible from income replacement benefits. Subsection 3 (7)(d) of *Ontario Regulation 34/10* applies in that context as well. The Adjudicator held that the benefits were deductible.
- [68] The Adjudicator in that case noted that while the insured was able to pre-select the amount of the monthly benefit, he was not entitled to the full amount unless his income was sufficient to qualify for the amount purchased.
- [69] The benefits adjustment clause in the Manulife policy has the same effect. Mr. McCurdy's maximum monthly benefit could be reduced by the insurer in the event that his income did not justify the \$3,000 monthly benefit.
- [70] The Manulife benefits in issue meet both (A) and (B) of subsection 3 (7)(d)(ii) of *Ontario Regulation 34/10*. They were periodic benefits offered to persons employed while the policy was in effect and the maximum benefit payable was limited to an amount calculated by reference to Mr. McCurdy's income from employment.
- [71] Accordingly, I conclude that the Manulife benefits that Mr. McCurdy received as a result of the motor vehicle accident and resultant injuries are deemed to be payments for loss of income under an income continuation benefit plan and are, accordingly, deductible under s. 267.8 (1) paragraph 2 of the *Insurance Act*. Similarly, the Manulife benefits are subject to the assignment and trust provisions of s. 267.8 (9) and (12).
- [72] As the Manulife benefits fall within s. 267.8 of the *Insurance Act*, the private insurance exception does not apply.

Net Judgment:

- [73] The total amount of income replacement benefits, CPP disability benefits and Manulife benefits received by Mr. McCurdy prior to trial is \$358,633.17. These sums are properly deductible from the jury's award for past loss of income of \$375,301, resulting in a net award of \$16,667.83.

[74] Accordingly, I find that the net amount of the plaintiffs' judgment is as follows:

In respect of Randy McCurdy

Non-Pecuniary General Damages	\$ 245,000.00
Past Loss of Income	\$ 16,667.83
Future Loss of Income	\$1,362,887.00
Pre-judgment interest	\$ 13,762.96

In respect of Sandra McCurdy (wife)

Loss of care, guidance and companionship	\$ 65,000.00
Compensation for Services Rendered	\$ 35,000.00
Pre-judgment interest	\$ 4,371.36

In respect of Jackson

Loss of care, guidance and companionship	\$ 7,816.37
Compensation for Services Rendered	\$ 6,000.00
Pre-judgment interest	\$ 776.14

In respect of Mya

Loss of care, guidance and companionship	\$ 7,816.37
Compensation for Services Rendered	\$ 6,000.00
Pre-judgment interest	\$ 776.14

In respect of Olivia (youngest child)

Loss of care, guidance and companionship	\$ 0.00
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TOTAL NET JUDGMENT	\$1,771,874.17
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[75] If either party has concerns with respect to the arithmetic set out above, they may bring those to my attention.

[76] The defendants are entitled to an order under s. 267.8(12)(a) of the *Insurance Act* that the plaintiff, Randy McCurdy, assign his Canada Pension Plan disability benefits and Manulife Financial disability benefits to the defendants' insurer, Zurich Insurance Company Ltd. effective from the date that the defendants satisfy the judgment until the amount of \$1,362,887 is recovered by the defendants' insurer under the assignment.

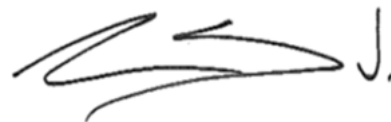
[77] The defendants are further entitled to an order under s. 267.8 (12) (b) of the *Insurance Act*, requiring the plaintiff, Randy McCurdy, to cooperate with the defendants and the

defendants' insurer, Zurich Insurance Company Ltd., in any claim or proceeding brought by the defendants or the defendants' insurer, Zurich Insurance Company Ltd., in respect of the assigned payments.

- [78] The plaintiff, Randy McCurdy, is obligated to account for and reimburse to the defendants' insurer, Zurich Insurance Company Ltd, any amounts received for Canada Pension Plan disability benefits and Manulife Financial disability benefits between the date of the jury's verdict and the effective date of the assignment.
- [79] It is my belief that the amounts awarded to the minor plaintiffs must be paid into court until those plaintiffs attain the age of 18. If counsel disagree, they can address this in their written submissions for costs.

Costs:

- [80] The costs of the action have not yet been addressed.
- [81] If the parties are unable to agree upon the costs of the action, the plaintiff shall serve and file written submissions as to costs, to be no longer than four pages in length double spaced and appending any relevant offers to settle to my attention through the court staff by January 12, 2024.
- [82] I am aware that the plaintiffs' Bill of Costs has been uploaded to Case Lines. It shall not be included in the page restriction set out above.
- [83] The defendants shall serve and file responding submissions, within the same parameters by January 26, 2024. Should the defendants wish to challenge the plaintiffs' Bill of Costs as excessive, the court would expect the defendants to file their own Bill of Costs, which again would not count as against page limits.
- [84] The plaintiffs may reply, if necessary, in writing, no longer than two pages in length by February 2, 2023.



Justice Spencer Nicholson

Date: December 5, 2023