Title Page

CANADA LAW BOOK

THE LAW OF DAMAGES

Looseleaf Edition

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(1) — Introduction

3.1490 Commonly, a plaintiff receives benefits, in money and services, designed to make good in whole or in part the loss for which the defendant is responsible. The courts have had considerable difficulty with the problem of when, if ever, these benefits should be taken into account in assessing the damages payable by the defendant. If credit is given to the defendant it seems that the wrongdoer reaps an undeserved benefit. If no credit is given, it appears that the plaintiff is compensated twice over.[575]

3.1500 The question is sometimes posed in terms of the philosophy of tort law. If the purpose of tort law is purely compensatory, it is said, over-compensation of plaintiffs is always inexcusable.[576] Full compensation is, by definition, adequate. If it is said that damage awards never do compensate fully, the remedy is to increase the measure of damages, not to double the "inadequate" compensation in a few cases. On the other hand, tort law is often said to perform a deterrent function by assigning to the wrongdoer, or at least to the activity in which the wrongdoer is engaged, the full cost of the wrongful act. On that basis, collateral benefits received by the victim should never be counted in relief of the tortfeasor. So long as someone is bearing a cost because of the defendant's wrong, the defendant should pay it.[577]

3.1510 This philosophical dichotomy does not provide an entirely adequate framework for discussion of the problem. First, the problem is not confined to tort law but arises equally in calculating damages for breach of contract. Secondly, an acceptance of a deterrent function in tort law does not necessarily justify compelling the defendant to pay more than the actual loss. The more basic question is the amount of the plaintiff's loss. Thirdly, even if the purpose of the law of damages is seen as entirely compensatory, the problem is not solved, because it is arguable that the plaintiff suffers a loss when the wrong is done. The receipt of a collateral benefit does not remove the loss; it simply causes the financial consequences to be shared by a third party. It is argued in a later chapter that such a sharing of financial consequences ought not to reduce a wrongdoer's liability.[578] This conclusion is assisted in the personal injury field by categorizing the plaintiff's claim as one for "loss of earning capacity"[579] or as "a need for nursing services"[580] rather than as a claim for loss of earnings or for the cost of services.

3.1520 The notion that the wrongdoer should bear the full cost of wrongdoing is very much weakened as a practical explanation of the existing system by the widespread use of liability insurance.[581] The cost of negligent driving, for example, is generally spread among all drivers; the cost of injuries caused by defective products is spread among millions of product users. The Pearson Commission, in recommending that damages should be reduced by the full value of social security benefits received by the plaintiff, seems to have accepted that the defendant's costs were, in effect, society's costs. The reason for the Commission's recommendation was that the elimination of overlap would bring about a "substantial saving in costs".[582]

3.1530 Nevertheless, the deterrence argument may perhaps be defended in a weakened

form. The allocation to a manufacturer of products of the full cost of damage caused by defects will tend, in the long run, to encourage cost-justified safety measures. If a substantial part of the medical expenses, for example, of persons injured by defective products, were borne by the community at large, the community would, in effect, be subsidizing the production of dangerous products. Manufacturers would be discouraged from producing a much safer product at a somewhat higher price; if the more dangerous product bore its full costs, consumers might be encouraged to buy safer products of a competing manufacturer or perhaps to do without the dangerous type of product altogether. Again, there is an argument for compelling automobile drivers to bear the full costs of accidents. The consequent level of insurance premiums may well induce some persons to alter their behaviour, as, for example, by refraining from buying a car or a second car, or refraining from making it available to teenage children, or refraining from using the car to drive to work.

3.1540 As Fleming pointed out many years ago,[583] the dichotomy between compensation and deterrence tends to distract attention from the possible solution to the problem that would be consistent with both objectives. This is to compel the defendant to pay the full cost of wrongdoing and to reimburse the collateral source. In this way the wrongdoer pays the full cost of the wrong, and double compensation to the plaintiff is avoided. There is a variety of techniques for securing this result. The best known is subrogation: the provider of the benefit is subrogated to the plaintiff's right to recover from the defendant in respect of the same loss.[584] It is also possible for the court to order that a portion of the award is to be held on trust for a third party or to require an undertaking from the plaintiff to make over a portion of the award to a third party.[585] These latter techniques, while avoiding double compensation, would not necessarily give the provider of the benefits an independent right of action against the wrongdoer. Yet another approach would be to allow the provider an independent right of action for the pecuniary loss caused by the wrong.[586]

FOOTNOTES

[575] See *Schulz v. Lethbridge Industries Ltd.* (2015), 2015 CarswellAlta 73, 10 Alta. L.R. (6th) 326 (Alta. Q.B.), citing this passage at para. 5, additional reasons 2015 CarswellAlta 476, 13 Alta. L.R. (6th) 410 (Alta. Q.B.).

[576] See *Royal Commission on Civil Liability and Compensation for Personal Injury* (London, H.M.S.O., 1978), §§277-9.

[577] See Posner, *Economic Analysis of Law*, 9th ed. (New York, Aspen Publishers, 2014), p. 234.

[578] See 15.870, 15.880, *infra*.

[579] See 3.710-3.980, *supra*.

[580] See 3.450-3.470, *supra*.

581 See *Lincoln v. Hayman*, [1982] 1 W.L.R. 488 (C.A.), at p. 492.

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582 *Supra*, footnote 576, §541.

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583 Fleming, "The Collateral Source, Role and Loss Allocation in Tort Law", 54 Cal. L.R. 1478 (1966).

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584 This is the usual solution in cases of private indemnity insurance. See *Glynn v. Scottish Union & National Ins. Co. Ltd*. (1963), 1963 CarswellOnt 219, 40 D.L.R. (2d) 929, [1963] 2 O.R. 705 (C.A.); *Fortin v. Li* (1992), 1992 CarswellBC 297, 96 D.L.R. (4th) 574, [1993] 1 W.W.R. 709 (B.C.S.C.).

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585 See 3.460, *supra*.

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586 See 3.510, 3.1120-3.1140, *supra*. On recovery of economic loss in tort, see *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., 1992 CarswellNat 168, [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289; *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co*., 1995 CarswellMan 19, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193.

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