Court of Queen's Bench of Alberta

Citation: Stewart v Collins, 2022 ABQB 258

Date: 20220413
Docket: 1301 03136
Registry: Calgary

Between:

Lorna Ann Stewart, Deborah Stewart-Evans, Allison Stewart and Jacqueline Brynjolfson

Plaintiffs

- and -

Michael J. Collins, BMC Logistics Inc. and John Doe Ltd.

Defendants

Reasons for Decision
of the
Honourable Mr. Justice N.E. Devlin

Overview

[1] George Stewart died in a tragic accident at the roadside of Stoney Trail in Calgary. His widow, Mrs. Lorna Stewart ("Mrs. Stewart"), and family brought this action against the driver and owner of the truck which struck him, under the *Fatal Accidents Act*, RSA 2000, c F-8.

[2] At the time of his death, George Stewart was working with Westana Equipment Leasing Inc. ("Westana"). Given his long service as a valued employee of this close-knit company, Westana continued paying his salary for several months after the accident and thereafter agreed to continue a stream of payments to Mrs. Stewart in lieu of workplace insurance. The parties held this trial of an issue to determine whether the defendants are entitled to deduct any of the payments made by Westana to Mrs. Stewart from her dependency claim against them arising from her husband's death.

[3] For the reasons that follow, I find that none of Westana's payments operate to reduce the defendants' total liability.

The nature of this proceeding

[4] This case proceeded on a documentary record. The parties submitted an agreed Evidence Binder containing a Statement of Facts, affidavits from key individuals, and transcripts from questioning. No *viva voce* evidence was called. The documentary evidence was admitted on terms agreed by counsel, stated as follows:

> Statements of fact contained in the records are admissible for the truth of their contents, subject to the following.
>
> a. The relevance and truth of any statement of fact contained in the records will be decided by the trial judge.
>
> b. The relative weight to be given to the statement of fact will be decided by the trial judge.
>
> c. The trial judge may accept or reject any part of the statement of fact contained in the records.

[5] As a result of the extensive agreement, this matter required only a half day of argument. Counsel are to be commended on their efficient and professional handling of the case.

Facts

[6] On August 22, 2011, George Stewart was run over by a semi-truck trailer driven by the defendant Michael Collins ("Collins"). He sustained fatal injuries in the accident. At the time, Collins was operating the truck in the course of his employment with the corporate defendant BMC Logistics Inc ("BMC"). Similarly, George Stewart was working in his capacity as an employee of Westana when the fatal accident occurred. He was supervising the relocation of a vehicle being hauled by the defendants.

[7] After the accident, Westana continued to pay George Stewart's salary up to the end of 2011. It did so voluntarily. In his examination on this point, Robert Cramers, on behalf of Westana, said that: "we considered that to be, I guess, severance pay, if you would." These amounts were between $6,000 and $8,000 per month.

[8] The Stewart family also called on the Alberta Worker's Compensation Board ("WCB") for assistance. The WCB subsequently covered the costs of George Stewart's funeral. However, on October 24, 2011, the WCB advised the Stewarts that their claim for benefits was not being accepted. The reason was that Westana operated in an "exempted industry" as it provided finance and leasing services. Westana had not purchased voluntary WCB coverage for its employees.

[9] This state of affairs is curious, as George Stewart was a heavy equipment mechanic by trade. Although there is a paucity of evidence on this point, it appears that he played a diverse series of roles for Westana, including manual labour that is typically the subject of compulsory WCB coverage. Nevertheless, Westana's business practices left him without any workplace life or disability insurance.

[10] Once the lack of coverage was discovered, the WCB rejected the Stewarts' claim, though it did not seek return of the amounts paid towards the funeral.

[11] After learning that Mrs. Stewart would receive no WCB benefits, her son-in-law Terry Evans approached Westana. He told Robert Cramers – then an officer and Director of the company – that Mrs. Stewart was in dire financial straits because of her husband's death. In his affidavit, Mr. Evans testified that he told Mr. Cramers that Westana should have had workplace insurance, given the work George Stewart was doing for them, and requested that they come up with a package for Mrs. Stewart in lieu of such coverage. He "urged Mr. Cramers and Westana to do the right thing to help [Mrs. Stewart]." Mr. Evans was not cross-examined on his affidavit and his evidence on these points is uncontradicted.

[12] Mrs. Stewart also filed an affidavit on this trial. She explained that she was dependent on her husband's income for basic living expenses. While she works, her income is modest, and he was the principal breadwinner of the family. Mrs. Stewart confirmed that Mr. Evans and her daughter approached Westana to help her financially, since they had failed to provide George with WCB coverage. She stated that her husband believed he had WCB coverage and had told her as much.

[13] I accept Mrs. Stewart's evidence that her husband told her he had WCB coverage. I find as a fact that she relied on this for her financial security. No member of the Stewart family ever suggested that Westana bore liability for the accident itself, only a moral responsibility to provide for Mrs. Stewart under the circumstances.

[14] Westana agreed to give Mrs. Stewart a stream of payments at the rate of $3,500 a month, commencing in January 2012, until she had received a total of $388,000. These payments were not subject to any withholdings. Mr. Cramers testified under questioning that this number did not relate to George Stewart's salary but rather was "just a number that we felt that we could honour". He further testified that:

> ...obviously, if Workers' Compensation would have looked after Mrs. Stewart, I would suspect that that would have changed some things. We were just looking at what her basic living expenses were, and we were trying to do the best that we could to help her out with that.

[15] His evidence on Westana's understanding of the nature of the payments to Mrs. Stewart was as follows:

> Q: All right. And the background to the agreement, I understand the Terry contacted Westana and wanted to sit down and discuss the situation on behalf of the family?
>
> A: Yes
>
> Q: And as you had indicated earlier, the company thought it was the right thing to do to help Lorna out; correct?
>
> A: That is correct.
>
> Q: And I take it that <u>this was a gratuitous thing done out of charity</u> on behalf of the company? [emphasis added]
>
> A: That is correct.
>
> Q: And they came up with a number as a way to help out Lorna with her living expenses and mortgage; correct?

A: That is correct.

[16] His evidence on this point was unchallenged.

[17] Westana's agreement to pay money to Mrs. Stewart was eventually memorialized in a signed document (the "Agreement"). The Agreement was executed sometime between September 12, 2013, and December 2013, after extensive discussions. Westana continued making payments to Mrs. Stewart throughout the time leading up to the execution of the Agreement. When the parties signed the Agreement in late 2013, they backdated it to September 1, 2011.

[18] Mrs. Stewart's evidence is that she ultimately signed the Agreement with the understanding that she was releasing Westana for liability for not having WCB coverage for her husband. She was not cross-examined on her affidavit and her evidence is uncontradicted.

[19] Notably, the limitation period for Mrs. Stewart to sue Westana in relation to her husband's death expired before the Agreement was signed.

[20] The Agreement described the amounts the company would pay (and had already paid) to Mrs. Stewart. Reciprocally, she released Westana from any further obligations related to her husband's death. The following sections of the Agreement are relevant to the question before the court:

> 2.02 Lorna Stewart does hereby declare and represent that she is the sole heir and beneficiary of the deceased George Stewart and has full knowledge of all claims and matters related to the affairs of George Stewart deceased including settlement of all claims and matters by his estate related to the accident resulting in the unfortunate demise of George Stewart during the course of his employment with the Corporation and wishes to settle all claims by this agreement.
>
> ...
>
> 2.04 In the event that any person(s) not party to this Agreement should make claim(s) against the corporation related to the accident resulting in the unfortunate demise of George Stewart during the course of his employment with the Corporation the Corporation shall provide notice of such claims to Lorna Stewart and payments due under article 1 above shall be held in abeyance pending resolution of any such claims. On settlement of any such claims payments shall recommence until all monies due under article 1 have been paid provided that if the Corporation is required to pay or settle such claims the amount of such payment shall be deducted from the amounts due under article 1.
>
> ...
>
> 3.01 Lorna Stewart does hereby fully, forever, irrevocably and unconditionally release and discharge WEL and any and all officers, directors, affiliates, subsidiaries, related companies, agents and employees and each of them past and present... and do hereby fully, forever, irrevocably and unconditionally release and discharge all and each of the above named parties, from any and all claims, charges, demands, actions, causes of actions, debts, sums of money, covenants, contracts, agreements, promises, damages, executions, obligations, liabilities and expenses, of every kind and nature whatsoever in law or equity and the claims

> released above include not only claims presently known to the said Lorna Stewart or her representatives, as the case may be, but also include all known or unanticipated claims, rights, demands, actions, obligations, liabilities and causes of actions of every kind and lore equity that would otherwise come within the scope of the released claims as described herein.

[21] On April 9, 2020, Mr. Cramers, now president of Westana, wrote to Mrs. Stewart. He advised her that the company had been heavily impacted by COVID and forced to reduce its team to a bare essential core to keep its "business in a holding pattern." He went on to write the following:

> Please accept this letter as notice that the payment plan that was in place regarding your settlement will be suspended. Due to the fact that there so many uncertainties facing us, Management has no choice but to take this position for a period of April 1, 2020 to June 30, 2020.

[22] Counsel advised, and it was not disputed, that payments from Westana had not resumed, and that Mrs. Stewart had taken no actions in this regard. As of the date of suspension of payments, Westana had given a total of $346,500 to Mrs. Stewart, leaving $41,500 outstanding according to the terms of the Agreement.

[23] Westana has never been a party to this litigation. The Stewart family did not name them as a defendant, and the defendants have never third-partied Westana. In submissions, counsel for the defendants stated that there was no evidence to support a finding of joint and several liability between Westana and the defendants for the accident which resulted in George's Stewart's death. The following exchange between the Court and counsel for the defendants took place during submissions:

> THE COURT: Is it your position that Westana would have been jointly and severally liable for the death with your insured?
>
> MR. MACLEOD: No, I don't believe that at all, Sir. I think there is an issue between my friend and I about contributory negligence of the deceased himself, but we don't see any way that would somehow be vicariously attached to the employer. I think if there is any concern expressed in the evidence by Westana is that they seem to be quite concerned by the fact they didn't get the voluntary Worker's Compensation coverage which was expressly directed to them and they seem to be trying to address that situation to some extent.
>
> We have no evidence that Westana thought, Oh God, were going to get sued in a tort action down the road. That's not in the evidence. It's just - -
>
> THE COURT: Right, but I mean it's a workplace death.
>
> MR. MACLEOD: Yes.
>
> THE COURT: Would they not likely have liability?
>
> MR. MACLEOD: Well - -

THE COURT: The whole purpose of WCB coverage is to ameliorate those claims

MR. MACLEOD: - - I think if there is exposure at all, Sir, it is that the industry that they were dealing with is exempt, therefore any coverage by Worker's Compensation would only be voluntary on behalf of the employer and they choose not to do that. I see some exposure there.

…

THE COURT: So you are - - if you don't think they had liability, then what are they being released from from?

MR. MACLEOD: Well, all I can do is read it from the documents themselves, is they seem to have some concern is expressed directly from the family that failure to have Worker's Compensation coverage to provide protection for the employer was a problem they wanted to know what they're going to do about that. So it seems to me after that point, they then went forward and tried to find a way to do what they could to make the family content.

I don't see anything in the evidence where anybody suggested that you guys may be liable in the tort claim, that's just something that's out there in the world. I don't see that in the evidence expressed directly by either Westana or the family to them. This really seems to be more focused on the Worker's Compensation lack of coverage that they provided to the employee.

[emphasis added]

[24] Thus, the parties effectively agreed that there was never a suggestion that Westana was negligent or could have been liable for George Stewart's fatal accident. This is somewhat unique, as litigants routinely seek to hold employers liable for workplace deaths. This case, and its outcome, must be understood in light of this fact.

The position of the parties

[25] The plaintiffs strongly urge that that Westana's payments to Mrs. Stewart were made *ex gratia* and are thus exempt for deduction. In the alternative, they argue that, if the payments were done to ameliorate Westana's liabilities, it was their liability for failing to provide death and disability insurance that Westana was addressing, not liability for the fatal accident itself.

[26] Counsel for the plaintiff points out that the ordinary meaning of the word "gift" does not cover all situations where this concept arises at law. The legal use is broader than the colloquial meaning of a gift. Courts have used terms like "gratuitous", "*ex gratia*", and "voluntary" to describe transfers that fall within this category.

[27] The defendants respond that the Agreement constitutes consideration to Westana, obviating any suggestion that the payments were a gift or made *ex gratia*. They further point to the fact that the payments were made to support Mrs. Stewart in the absence of her husband's salary – exactly what they are being sued for by Mrs. Stewart – to highlight the double recovery problem.

The Governing Principles

[28] I begin by noting Cromwell J.'s insightful observation at the outset of ***IBM Canada Ltd v Waterman***, 2013 SCC 70 at para 3, that the question of when collateral payments received by the victim of a loss-event are to be deducted from the damages owed by the wrong-doer who caused the loss is subtle and complex. As he held for a majority of the Supreme Court, a case such as this:

> ...in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.

[29] This acute description of law stands in contrast to the ostensibly simple root principle at play, namely that damages are meant to make a plaintiff whole, not to enrich them beyond the scope of their proven loss.

(i) The Rule against double recovery

[30] The basic rule against double-recovery is straightforward. Plaintiffs in tort cases should not be over-compensated for their injury. Rather, they are meant to be compensated according to the principle of restitution, which seeks to restore them to the position they were in prior to the negligent event. It follows that plaintiffs should not receive double compensation. This principle was articulated by the Supreme Court in ***Ratych v Bloomer***, [1990] 1 SCR 940 at para 94, in the following terms:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account.

[31] Subject to limited exceptions, this principle dictates that a defendant is only liable to make a plaintiff whole for their actual loss, and in a reduced amount if that loss (or potential loss) was otherwise ameliorated: see also ***Cunningham v Wheeler***, [1994] 1 SCR 359, [1994] SCJ No 19 at para 75. This may include situations in which the plaintiff received a 'collateral benefit' from another source that lessened their actual loss.

[32] However, not all collateral benefits received by a person who has suffered a loss-event will trigger an overcompensation concern, as the Supreme Court stated in ***Waterman*** at paras 23, 28 and 32.

> Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty.
>
> ...
>
> Returning to the issue of connection between the benefit and the breach, the question is what sort of link is required before the issue about deduction arises. The cases suggest two answers. The advantage must either be one that (a) would not have accrued to the plaintiff "but for" the defendant's breach *or* (b) was intended to indemnify the plaintiff for the sort of loss resulting from it. If neither of these conditions is present, there is no issue about deduction. If either of these conditions is present, there is.
>
> ...
>
> To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant's breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved.
>
> [emphasis added]

[33] This general articulation of the principles is subject to a robust series of exceptions. Again, as the Supreme Court explained in ***Waterman***:

> ...there are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in *Parry*, "[t]he common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy": p. 13. Or, as McLachlin J. wrote, this issue raises a question of "basic policy": *Ratych*, at p. 959.
>
> [emphasis added]

[34] Overall, the recent arc of the Supreme Court's guidance on deductibility of collateral benefits begins with ***Ratych***, in which McLachlin J (as she then was) articulated a narrow view of what form of collateral benefits should be non-deductible. Subsequently, the majority in ***Cunningham*** took a more expansive approach to the non-deductibility of benefits. As aptly summarized by the British Columbia Court of Appeal in ***Kask v Tam***, [1996] BCJ No 498 (CA) at para 23 ["***Kask***"]:

> [w]hile *Ratych* survives to the extent of requiring some demonstration that the salary continuance was paid for in some way by the plaintiff, *Cunningham* so

> lightened the burden of proof as to reverse the philosophical rationale in *Ratych*. The effect of the change is to take us back to the *Chan v. Butcher* and *Boarelli v. Flannigan* approach which is to ask, not whether there is a loss, but what is the nature of the benefit. [emphasis added]

[35] The focus on the nature of the benefit at issue was crystalized in the Supreme Court's most recently visitation of this issue in ***Waterman***. There, the Court reviewed the evolution of the law and restated the general principles on deductibility of collateral benefits in the following terms at para 76:

> From this review of the authorities, I reach these conclusions:
>
> (a) There is no single marker to sort which benefits fall within the private insurance exception.
>
> (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
>
> (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
>
> (d) In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it.
>
> (e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

[36] The current state of the law following ***Waterman*** is that deductibility of collateral benefits is more contextual than black-line categorical. Trial Courts are called upon to consider the relationship of the benefit to the rationale of the traditional exceptions, read those in light of the policy considerations at play, and situate each case within the matrix of outcomes in similar cases to reach fair and consistent results.

(ii) Exceptions to the rule against double recovery

[37] The two classic exceptions to deductibility are benefits obtained by the injured party through voluntary payments or gifts, and those flowing from private contracts of insurance: ***Cunningham*** at para 80.

[38] In respect of a plaintiff receiving charitably given monies, the Supreme Court held in ***Waterman***, at para 4, that:

> [t]he rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong

[39] A charitable payment from an employer should not be treated any differently than one made by a relative, friend, or stranger: ***Provost v Dueck Downtown Chevrolet Buick GMC Ltd***, 2021 BCCA 164 at para 71 ["***Provost***"]; ***Boarelli v Flannigan***, [1973] OJ No 1989 (CA) at para 35.

[40] This exception extends to an employer's voluntary and gratuitous payment of an injured employee's salary. There is strong authority that such voluntary payments will not be deducted from tortious damages awarded against a third party who caused an injury that resulted in some measure of job loss. These cases are aptly summarized by the New Brunwick Court of Appeal in ***Gilliss v Breau***, [1971] NBJ No 25, 19 DLR (3d) 615. That decision quoted this Court's decision in ***Mazepa v Edwards***, 1953 CanLii 604 (AB QB), [1953-54] 10 WWR (NS) 565 (Alta SC) at para 8, where McBride J declined to reduce damages for lost income due to a voluntary continence of salary by the plaintiff's employer, holding that:

> [o]n the authorities, in my view, a compassionate payment of this kind by a generous employer does not enure to the benefit of the wrongdoer, and I accordingly allow her the full amount [of lost wages] notwithstanding the compassionate payment received by her.

[41] This branch of the charitable support exception remains good law after ***Raytch***, as explained in ***Kask***, (cited above at para 39), and in light of Supreme Court's express inclusion of broad policy considerations encouraging charitable support for those in need in ***Waterman***.

[42] The second general exception to double recovery is for insurance proceeds: ***Cunningham*** at para 74. The basis for this exception is that a wrongdoer should not benefit from plaintiffs having planned for negative contingencies through the prior purchase of insurance: ***Krawchuk v Scherbak***, 2011 ONCA 352 at para 11.

[43] As will be discussed below, the initially narrow private insurance exception has been expanded to include certain public insurance schemes, such as EI and CPP benefits. The Supreme Court has also attenuated the importance of direct beneficiary contribution to schemes of insurance. Most recently in ***Waterman***, the Court openly questioned the rationale for requiring that a plaintiff personally contribute to the insurance. This follows Justice Cory's conclusion in ***Cunningham***, at para 88, that:

> [t]o say that the exception applies only to private insurance, where actual premiums are paid to the insurance company, would create barriers that are unfair and artificial...This would be manifestly unfair. There is no basis for such a socially regressive distinction.

[44] Finally, and critically to this case, the Supreme Court in ***Cunningham***, at paras 95-96, also held that, on a principled basis, the private insurance exception should encompass situations where companies self-insure.

> Further, the presence or absence of a third party carrier for the insurance will not affect the non-deductibility of the benefits from the wage claim. A requirement of a third-party carrier as a necessary condition for non-deductibility was considered, and in my view properly rejected, by the House of Lords in *Parry v. Cleaver*. At page 558, Lord Reid asks and answers this question:

> Then I ask -- why should it make any difference that he insured by arrangement with his employer rather than with an insurance company? In the course of the argument the distinction came down to be as narrow as this: if the employer says nothing or merely advises the man to insure and he does so, then the insurance money will not be deductible; but if the employer makes it a term of the contract of employment that he shall insure himself and he does so, then the insurance money will be deductible. There must be something wrong with an argument which drives us to so unreasonable a conclusion.
>
> It is often more economical for large corporations to self-insure than to purchase insurance from a third party carrier. Risk can be spread among the employees, who are the policy-holders of the self-insurance. The law should not discourage the efficiencies of self-insurance within large corporations or government agencies.

[45] The present case must be considered in the framework of these principles.

Application of the principles

(i) A double recovery analysis is required

[46] The payments by Westana would not have happened but-for George Stewart's death. Those payments went to the individual most financially impacted by that loss, to help ameliorate the impact of losing George Stewart's income and support. Therefore, there is a sufficient nexus to the liability faced by the defendants to require a double-recovery analysis.

(ii) The 2011 payments in lieu of salary

[47] I find that the 2011 payments made in lieu of George Stewart's salary were in substance a charitable gift. No one asked for these payments. They were made reflexively by Westana out of a sense of loyalty and remembrance of a dearly regarded co-worker. Most of these monies were paid before the absence of WCB benefits, and its impact on Mrs. Stewart, were known to Westana. I find as a fact that the August-to-December 2011 payments were voluntary, without consideration, and *ex gratia*.

[48] In ***Kask***, at para 24, the British Columbia Court of Appeal analyzed the Supreme Court's guidance in ***Cunningham*** and concluded that tort feasors will not generally be allowed to have the benefit of an employer's generosity:

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

[49] I agree and find that Westana's continued payment of George Stewart's salary is exactly the sort of charitable act that courts should take care not to disincentivize: ***Cunningham*** at para

80. This case relates to an accident that took place over 10 years ago, and it is not lost on this Court that the resolution of such claims can often come far too late to give claimants relief when they most desperately need it. Westana was ready, even eager, to step in and ensure that Mrs. Stewart had the financial resources to live her life, almost immediately after the accident and apparently without any hint of a legal consequence for failing to do so. For this, Westana is to be commended.

[50] The payments in lieu of salary made in 2011 are not deductible.

(iii) The monthly stream of payments commencing in 2012

[51] The $3500 monthly payments made by Westana to Mrs. Stewart commencing in 2012 are a matter of greater subtly and require a careful analysis of their true nature. The employer's voluntary monthly payments to Mrs. Stewart up to the signing of the Agreement remained predominantly charitable in nature. Their character in this regard is, however, tempered by Westana's contemplation that they may have some legal exposure for failing to provide WCB coverage.

[52] To be clear, the record in this case does not establish that Westana had any liability. Nothing in these reasons should be taken as implying that Westana either had a duty of care to provide workplace insurance, nor that they had negligently misrepresented the state of affairs on this topic to George Stewart. Rather, as part of the discussions around their payments to Mrs. Stewart, it was put to them that they had a moral, if not legal, responsibility to help her, and this argument obviously resonated with them.

[53] On the record before me, I find that Westana was motivated by a desire to do right by their cherished employee's widow under the tragic circumstances. Attenuation of legal liability was, at most, a secondary consideration. Specifically, I find as a fact that Westana's payments were, up until the actual date of the Agreement was signed in late 2013, made gratuitously, for a dominantly beneficent purpose, and were not contingent or based on any expectation of future release or consideration.

[54] I make this finding of fact on several bases. First, the concerned parties said so and their evidence is both uncontradicted and unchallenged. Second, the payments started and continued for a significant period before any agreement was in place containing any releases or other terms to their benefit. Third, the quantum of payment was based not on liability for the accident but more generally on what Westana could afford to assist Mrs. Stewart in her basic living costs. Fourth, no party to the accident lawsuit acted in a manner consistent with Westana having any liability for the accident whatsoever. Fifth, Westana felt entitled to stop the payments when it could no longer afford them and Mrs. Stewart took no action to enforce further payment after that point.

[55] I further find, by inference available on the totality of the evidence, that Westana would not have sought repayment of the pre-agreement monies had the Agreement not been signed. Indeed, by the time the Agreement was signed, the limitation period for Mrs. Stewart suing Westana in relation to the fatal accident had expired.[1]

[1] The limitation for the defendants seeking third-party contribution from Westana would not have run by the time the Agreement was signed, as the claim against the defendants was filed on March 12, 2013 and served on April 2, 2013.

[56] The signing of the Agreement did not entirely change the nature of the payments. Rather, I find, as a matter of fact, that the payments made by Westana after the release continued to be principally motivated by a sense of moral and charitable obligation, as well as to compensate Mrs. Stewart for the absence of workplace insurance benefits.

[57] That said, the Agreement took the periodic payments after its signing out of the realm of pure charitable gift. Consideration cleared flowed to Westana under the Agreement. Both parties agreed that Westana could have faced litigation for either their failure to secure WCB coverage for George Stewart, or representations that the Stewarts relied upon in this regard. At a minimum, the release covers-off that liability. It, therefore constitutes consideration expressly given in exchange for the payments at issue, whether the risk of such liability was real or not. The Agreement also allowed Westana to effectively 'cap' its liability in respect of George Stewart's death, by virtue of clause 2.04, if brought into an action such as this one as a third-party. While a more remote benefit, this too constituted a form of consideration, and flavoured the payments with beneficial element to Westana that had been previously absent.

[58] Moreover, the backdating of the Agreement to encompass payments previously made demonstrates an intention by Westana to leverage its past charity for future advantage. A gift is a voluntary, gratuitous transfer of property without consideration: ***Peermohamed v Pirani,*** 2018 ABQB 968 at para 30. The Agreement gave Westana a legal benefit in exchange for an ostensibly enforceable obligation to continue its previously voluntary payments. Once the Agreement was signed, the arrangement between Mrs. Stewart and Westana definitively exited the realm of pure charitable giving.

[59] On the unique facts of this case, however, I find that the Agreement only changed the nature and character of the payments modestly, and towards a direction that does not assist the defendants.[2]

[60] My first reason for reaching this conclusion is that it is far from clear that Westana had any legal liability in this case whatsoever. The release they obtained was an 'abundance of caution' measure rather than a limitation on clear liability.

[61] Second, for precisely the sort of policy reasons described by the Supreme Court in ***Waterman***, the mere presence of a release does not necessarily nullify or override the gratuitous nature of voluntary giving. Private charity has taken on a significantly different complexion in the current age. Crowd-sourced funding platforms, such as GoFundMe, have radically altered the scope and scale of private gifts to those who have suffered tragic events or losses. It is now not uncommon to hear of very large sums being raised through donations from the public to assist those who have suffered potentially legally compensable losses. One key element of this development is that the provision of such assistance is now likely to be cloaked in legal procedure: see for instance Johanna C.C. Caithness, "Legal Issues Associated with Informal Public Appeals and Crowdfunding" [2020] 39 Est Tr & Pensions J 271.

[62] Put simply, no individual, entity, or agency would sensibly pay-over large sums of money to a charitable beneficiary without some form of legal agreement relieving them of any liabilities for doing so. A sensible lawyer would advise anyone contemplating making large, gratuitous

[2] This case should not be taken as authority for the proposition that payments made by a party proximate to a loss, pursuant to a contract for release of liability, are routinely *ex gratia* or exempt from set-off against the damages owed by potential defendants. In most instances, such settlements are conclusively an exchange of consideration. This case, as I have endeavored to outline, turns on its rather unusual and specific facts.

payments to another party in respect of a loss-event to secure a release very similar to the one found in this case.

[63] A release protects a charitable giver from their gift being construed as an avowal of liability for the loss itself, or assumption of obligation for further payments. However, a release neither alters the fundamental character of the charitable gift, nor operates to offset the liability of wrongdoers responsible for the loss that motivated the giving.

[64] That said, the contents of the Agreement in this case satisfy me that the periodic payments made to Mrs. Stewart are not gifts in the purest sense, despite having strong charitable overtones, and cannot be exempted from deduction on this basis alone.

(iv) The periodic payments are akin to private insurance proceeds

[65] To the extent that the periodic payments are not purely charitable, they were made in moral and legal contemplation of Westana's role in leaving Mrs. Stewart without insurance coverage in the event of a debilitating accident to her husband. I find as a fact that this was the essence of the discussions between the Stewarts and Westana and the *raison d'être* of their arrangement.

[66] As such, these payments were effectively a form of self-insurance in lieu of either public workplace insurance, or other analogous coverage, that Westana determined it ought to have provided to George Stewart. Therefore, to the extent that Westana was buying-off liability through the Agreement, the potential liability in question was their failure to fund a non-deductible benefit. To borrow a phrase from the Ontario Court of Appeal in ***Demers v BR Davidson Mining & Development Ltd***, 2012 ONCA 384 at para 13, these payments "are akin to payments under a private insurance policy". More specifically, they are akin to self-insurance for death and disability risks for their employee.

[67] Applying the reasoning of Cory J in ***Cunningham***, as quoted above, I can find no principled reason why such payments should not be given similar treatment to the proceeds of formal insurance. Doing so advances the Supreme Court's mandate to achieve "equal treatment...in similar situations" with a focus on the "nature and purpose of the benefit". It is also consistent with the Supreme Court's modern departure from the moralistic risk/return underpinnings of the traditional private insurance exception.

[68] Comfort for this conclusion can be found in ***Canadian Pacific Ltd v Gill***, [1973] S.C.R. 654. In that case, 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". A similar resonance is also found in ***Jack Crewe Ltd v Jorgenson***, [1980] 1 SCR 812. There, the Court reached a parallel conclusion with respect to unemployment insurance, holding at p. 818 that funding such a benefit:

> ...was an obligation incurred by reason of respondent's employment, therefore, to the extent that the payment of those contributions resulted in the provision of unemployment benefits, these are a consequence of the contract of employment and, consequently, cannot be deducted from damages for wrongful dismissal.

[69] Just as these payments have a strong charitable element but are not strictly speaking gifts, they equally bear the hallmarks of a private indemnity earned by the loss-victim through his

years of dedicated work. Despite not falling strictly within the private insurance exception, the fundamental nature of the payments – beyond their core beneficent intention – was to replace the private insurance the giver regretted not having supplied as a workplace benefit to its employee.

[70] Deducting these payments from the damages owed by the parties responsible for George Stewart's death would be contrary to their dual purposes: charitable assistance and replacement of non-deductible workplace insurance. That outcome would be unfair, arbitrarily disadvantage Mrs. Stewart relative to similarly situated tort victims, and disincentivize corporate social responsibility.

Conclusion

[71] A stranger to the tort came voluntarily to the aid of its victim, in part from moral concern and in part as recompense for failing to provide a private indemnity that the victim and his dependents had mistakenly relied upon. Exempting Westana's payments from deductibility is a principled extension of the evolving law in this area.

[72] For these reasons, none of the monies received by Westana to date are deductible from any damages owed by the defendants for their role in George Stewart's tragic accident.

Heard on the 10th day of December, 2021.
Dated at the City of Calgary, Alberta this 13th day of April, 2022.

N.E. Devlin
J.C.Q.B.A.

Appearances:

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