

# **DISABILITY BENEFITS AND FAMILY LAW**

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## **Introduction**

The question often arises as to whether or not a disability benefit should be included in the equalization of net family property on marriage breakdown. In Ontario the answer to this question will depend on the answers to three distinct questions:

1. Is it property?
2. Is it exempt?
3. Would it be unconscionable to include the value in the accounting?

In this article we will review the legislation and the reported cases and comment on same. It is our hope to clarify when disability benefits are definitely to be considered in the equalization process, when they are definitely not to be included, and when there is still some uncertainty.

There are basically several types of disability benefits to consider:

- As part of a normal retirement pension plan
- From an employer sponsored disability plan
- Workplace Safety & Insurance Board payments (formerly Workers' Compensation Board)
- *Canada Pension Plan* disability benefits
- Payments from a privately owned disability insurance policy
- Payments from an accident and sickness insurance policy
- Disability payments under a Life Insurance Policy.

There are reported court cases for each of Ontario, Alberta, British Columbia, Nova Scotia, Saskatchewan, Manitoba, and New Brunswick. In this article we will deal only with decisions under the *Ontario Family Law Act*<sup>1</sup>, except to the extent that comments from other provinces may be helpful. However, our comments may apply to the other provinces as well.

## **Is it Property?**

The *Ontario Family Law Act* defines property as:

“Property” means any interest, present or future, vested or contingent, in real or personal property and includes,

- (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
- (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
- (c) in the case of a spouse's rights under a pension plan that have vested, the spouse's interest in the plan including contributions made by other persons;

In some of the reported court cases, it is not clear whether the judge was trying to determine if the disability benefit was property or whether he was trying to determine whether it was excluded or not. In some cases consideration was given as to whether the member made contributions to the plan, if payments were from a retirement pension plan, or if the payments continued for life. None of these considerations really seem to be appropriate in deciding whether or not the disability benefits are property.

The definition of property in the *Ontario Family Law Act* is all-inclusive, and it is very difficult to think of something that is not property. The only example that comes to mind is that a person's job or degree is not property. Since the definition of property is all-inclusive, disability benefits would be considered to be property unless there was good reason not to do so. In case there were any questions about whether or not disability benefits are property there are cases that have clarified this matter.

In the case of *Brinkos v. Brinkos*<sup>2</sup>, Mrs. Brinkos had transferred gifted property to a trust where she was the beneficiary of all of the income, and the trustees had the right to encroach on capital for her benefit. Mrs. Brinkos argued that her right to future income from this trust was not property and the lower court agreed with her. However, the Ontario Supreme Court, High Court of Justice, reversed this decision. Mrs. Brinkos had argued that her interest in the trust could not be property because by its terms it was incapable of being transferred. In the appeal the court quoted the definition of property from *Jowitt's Dictionary of English Law*, 2<sup>nd</sup> edition (1977), which was,

In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates and interests in corporeal things, but also rights such as trademarks, copyrights, patents and rights *in personam* capable of transfer or transmission, such as debts.

The court went on to say,

Jowitt cannot have intended to exclude from property anything rendered inalienable by choice or agreement. The last three lines of his definition must be taken to mean that the item under consideration be intrinsically capable of transfer. This would

exclude personal income because it is inseparable from the personal effort required to attract it; it does not exclude a vested entitlement to income even though it is not marketable. This remains property without a market value, but with a very real value to the owner.

The court then decided that the present value of the future income from the trust was family property. In the same way, the right to future disability income payments to be received is also property.

It is sometimes argued that a future stream of income should be used only in determining ability to pay support. It is suggested that it should not be included as well in property as this could lead to double dipping.

The Supreme Court of Canada dealt with whether or not a stream of pension payments was income in the case of *Clarke v. Clarke*<sup>3</sup> when they ruled that a pension in pay was property. Double dipping was not a consideration in this case. Although this was based on the Nova Scotia definition of property, the same would hold true based on the Ontario definition, and probably all other provinces.

In most of the reported court cases that I have reviewed that dealt with disability benefits, it was clear that these benefits were determined to be property. This includes:

*Arvelin v. Arvelin*<sup>4</sup>  
*Birce v. Birce*<sup>6</sup>  
*Fahner V. Fahner*<sup>8</sup>  
*Inverarity v. Inverarity*<sup>10</sup>  
*Kelly v. Kelly*<sup>12</sup>  
*Leger v. Leger*<sup>14</sup>  
*Yee v. Yee*<sup>16</sup>

*Balcombe v. Balcombe*<sup>5</sup>  
*Brinkos v. Brinkos*<sup>7</sup>  
*Hughes v. Hughes*<sup>9</sup>  
*Iurincic v. Iurincic*<sup>11</sup>  
*Kowalski v. Kowalski*<sup>13</sup>  
*Higgins v. Higgins*<sup>15</sup>

In the recent case of *Onofrio v. Onofrio*<sup>17</sup> Justice Stortini recognized that past payments from Workers' Compensation and *CPP* disability payments were property to be included because they were not specifically designated as being for non-economic loss. However, Justice Stortini ruled that future payments of both were not even property in spite of all the decisions cited above, where as in *Onofrio*, most of the above-cited payments were all future payments that would cease when the person recovered from their disability.

## **Is It Excluded Property?**

Since the legislators were careful to ensure that everything is to be included in the accounting as being property, it follows that nothing is to be exempt unless it accords perfectly with the definition of excluded property.

The exemption provisions of the different provinces are not all identical and therefore decisions outside of Ontario may not be relevant in considering this matter.

Section 4(2) of the *Ontario Family Law Act* says,

The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.
3. **Damages** or a right to **damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship**, or the part of a settlement that represents those damages. (emphasis added)
4. Proceeds or a right to proceeds of a life insurance policy as defined in the Insurance Act, **that are payable on the death of the life insured**. (emphasis added)
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.
6. Property that the spouses have agreed by a domestic contract is not to be included in the spouse's net family property.

Section 4(3) then places the onus of proving exclusion under s. 4(2) "on the person claiming it."

Whether or not the value of the disability benefit may be excluded from the Net Family Property Statement in Ontario, as being exempt property will depend on whether or not it meets one of these definitions. Some disability benefits will be excluded property and some will not.

## Reasons for Including

Justice Quinn pointed out that the case of *Mead v. Mead*<sup>18</sup> dealt with the definition of life insurance in the *Insurance Act*<sup>19</sup>. In that case it was said that under s. 1(16) of the Insurance Act, disability insurance is considered to be life insurance. He then went on to say,

Since the drafters of the *Family Law Act* went to some pains to exclude, from net family property calculations, life insurance payable in the event

of death but were silent as to life insurance payable in the event of disability, it might be said, with at least some justification, that what is not excluded must be included.

It is clear from this that disability payments from a Life Insurance Policy as defined in the *Insurance Act* are not excluded property, as they are not payable on death and do not coincide with the wording of Section 4(2) paragraph 4 of the *Family Law Act*.

In the case of *Snjaric v. Snjaric*<sup>20</sup>, Justice Aston dealt with disability payments under the *Workers' Compensation Act*<sup>21</sup> and the *Canada Pension Plan Act*<sup>22</sup>. He said,

Workers' Compensation benefits...are a direct substitution for a person's common-law right to claim damages. I think that is an important distinction; in fact, more important than whether the notion of damages depends upon fault or no fault. Canada Pension benefits or private disability insurance benefits (as in *Lurincic*) may be payable to a person based on illness. But Workers' Compensation benefits are only payable in relation to an injury sustained at the workplace, which might otherwise sustain a claim for damages, but for the *Workers' Compensation Act*. Canada Pension benefits, on the other hand, are not paid as a substitute for any right to claim damages. Such benefits are not excluded under section 4(2) 3 and must be included in the spouse's net family property calculation.

In summary, Justice Aston said,

*Canada Pension Plan* disability payments and Workers' Compensation (W.S.I.B.) benefits in pay at the date of separation represent a future income stream, not dependent upon personal services and are, therefore, 'property' within the meaning of section 4 (1) of the *Family Law Act*. *Canada Pension Plan* disability payments do not constitute 'damages or a right to damages' and should not be excluded from net family property because they are 'akin to damages', however equitable the result.

In the case of *Birce v. Birce*<sup>23</sup>, Justice Rutherford had some reservation about including the value of *Canada Pension Plan* disability benefits but concluded based on the analysis in *Snjaric v. Snjaric*<sup>24</sup> that the value of the benefits should be considered as property. He did not discuss whether or not the value should be considered to be excluded property as being damages.

Disability benefits that are clearly not damages (e.g. based on sickness or inability to work not due to injury) should not be excluded.

## Reasons For Excluding

In the case of *Balcombe v. Balcombe*<sup>25</sup> the trial judge found that the disability pension payable to Mrs. Balcombe was excluded property under Section 4(2) 3 of the *Family Law Act*. The Ontario Court of Justice General Division, Divisional Court upheld this decision and said, "In our view, the essence of the matter is that the yearly payment of \$3,198.60 received by the wife (shown at p. 83 of the appeal book) is not a payment from a "retirement pension plan" but payment from a plan that is predominantly a "disability pension plan" and, therefore, qualifies as "excluded property" within the provisions of s. 4(2) 3 of the Act." With respect, in the author's opinion, the source of the payments should not be the deciding factor.

In the case of *Fahner v. Fahner*<sup>26</sup>, Mrs. Fahner had received a lump sum *CPP* disability benefit and was continuing to receive disability benefits. No issue was raised concerning the ongoing monthly payments. In deciding that the lump sum amount was exempt, Justice Gordon explained that the *CPP* disability payment was composed of two parts, being a flat rate plus a percentage of retirement pension and said, "The calculation does not, in my view, establish the funds as being paid for loss of earnings but rather to reflect compensation for the disability." He did not discuss whether or not it constituted damages.

In *Kelly v. Kelly*<sup>27</sup>, (involving payments from Worker's Compensation), Justice Kerr in the Ontario Supreme, High Court of Justice said,

...Notwithstanding the method of calculation of the compensation, it does not appear that the compensation payable is actually paid as loss of earnings as opposed to compensation for the injury itself. Rather it appears to be paid as compensation for a reduced earning capacity. As such, it is clearly damages for personal injuries. In this respect I adopt the reasoning of McKinnon L.J.S.C. in *Young v. Young*.

Justice Kerr did not seem to find it important that the Act did not mention damages for "reduced earning capacity". He defined damages as, "The value estimated in money of something lost or withheld; the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained". He then excluded the Workers' Compensation disability payments as being exempt property.

However, in the case of *Vanderaa v. Vanderaa*<sup>28</sup> the disability payments were not fault-based and Justice Leitch said,

In this case the [husband's] disability pension cannot be considered tantamount to a retirement pension. The disability pension is not the hybrid disability/retirement pension considered in *McTaggart*. This pension is like the type of pension considered in *Pallister* and *Balcombe*. The benefits paid to the [husband] are paid to compensate him for his disability. The benefits are not paid because of years of service rendered

to his former employer... the [husband's] right to these disability benefits is within the very broad definition of 'property' set out in s. 4(1) of the *Family Law Act*. However, I would exclude the value of these benefits from the [husband's] net family property pursuant to s. 4(2) para.3 of the *Family Law Act*, having classified them as compensation for personal injury.

Justice Leitch seems to be of the opinion that all compensation for personal injury (damages?) is exempt whether it is fault related or tort related. This certainly coincides with Section 4(2) paragraph 3 of the *Family Law Act*.

Justice Quinn says that in *Brignolio v. Brignolio*<sup>29</sup>,

...it was held that the disability pension was property but it was excluded under s. 4(2) 3. Poupore J. concluded that a disability pension which was subject to termination (that is, upon a finding that the disability is no longer total and permanent) is a true disability pension and such a pension is excluded property under the *Family Law Act*.

In the case of *MacDonnell v. MacDonnell*<sup>30</sup>, Justice Roscoe seems to have concluded that the *CPP* disability pension should not be included in the equalization of assets since the splitting of *CPP* credits is available under the *Canada Pension Plan Act*. Justice Hunter, in the case of *Czemerer v. Czemerer*<sup>31</sup> reached the same conclusion. Apparently they were not aware that part of the disability benefit could not be equalized under the *Canada Pension Plan Act*.

The Ontario legislators chose to consider "damages" excluded property in Section 4(2) 3. They could have limited the exclusion to damages that are tort related, but they did not. In these cases the courts seem to have given "damages" a wide definition.

## **Partially Included and Partially Excluded**

For disability benefits to be excluded under s. 4(2) 3, it would be necessary for them to be "damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages."

The case of *Shaver v. Shaver*<sup>32</sup> considered the matter of excluded property. Mr. Shaver had been in an automobile accident and had received a lump sum disability payment. The amount was composed of general damages and lost future wages. However, the lost wages were reduced by disability benefits received from another source. In explaining Section 4(2) paragraph 3, Justice Mendes da Costa said,

The legislative purpose is to permit spouses to retain for their own

purposes property which is “completely personal” to them, and to which they are entitled for the purpose of replacing “some aspect of their enjoyment of life which cannot be truly shared with any other individual, no matter how close the relationship”.

Apparently this was a quote from *Mittler v. Mittler*<sup>33</sup>. Justice De Costa went on to say, “Lost wages and disability benefits do not satisfy the statutory test, and the value that qualified for exclusion was the general damage award of \$25,000, which, I understand, was compensation for pain and suffering.”

It is interesting to note that the court considered each part of the payment separately. They determined that the payment for pain and suffering qualified as damages and was therefore, excluded or exempt under Section 4(2) paragraph 3 of the *Ontario Family Law Act*, while the payment for lost future wages did not qualify and must be included.

In *Lurincic v. Lurincic*<sup>34</sup>, Justice Quinn reviewed various cases and dealt with whether the disability pension was property or not, whether it was excluded or not and whether or not it would be unconscionable to include it in the equalization. Justice Quinn was of the opinion that the proper definition of damages is that which is contained in Dukelow, D.A., and Nuse, B., *The Dictionary of Canadian Law*, which is, “Pecuniary compensation for a wrong, either a breach of contract or a tort.” He went on to say, “In my view, the language of s. 4(2) 3, all of it, bespeaks fault-based or tort-based compensation.”

In reviewing the case of *McTaggart v. McTaggart*<sup>35</sup>, Justice Quinn said,

I concur with the result in *McTaggart*. However, I would not have found it necessary to enter into an in-depth analysis of the disability pension. Whether it was funded by the employer or was geared to Mr. McTaggart’s level of income or years of service is not relevant, in my opinion, on the issue of whether the pension is property under s. 4(1) or excluded as “damages” under s. 4 (2) 3.

In summarizing, Justice Quinn said,

In most, if not all, of the cases where a disability pension has been found to be excluded property, it has been because the pension was seen as damages or the equivalent of damages under s. 4(2) 3. As I explained earlier, the definition of damages adopted by the Court in *Kelly v. Kelly*, *supra*, and by subsequent courts, omits what I regard as the essence of damages – the element of fault or of wrongdoing. In my view, the language of s. 4(2) 3 bespeaks fault-based or tort-based compensation.

Justice Quinn then found Mr. Lurinic’s disability benefits were **not** excluded property.

From the foregoing it seems clear that whether or not the value of disability benefits is exempt property or excluded property depends entirely on whose definition of “damages” is considered. It is therefore important to determine exactly what is meant by “damages”.

The cases of *Kowalski*<sup>36</sup>, *Shaver*<sup>37</sup> and *Vanderaa*<sup>38</sup> all involved funds received because of an automobile accident. In all three cases it was recognized that general damages (for pain and suffering) were excluded or exempt but payment for lost wages and other lost income must be included in Net Family Property.

## Definitions

The term “damages” is defined differently in different dictionaries.

*Black’s Law Dictionary* defines damages as, “A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another”.

The *Canadian Oxford Dictionary* says that damages are a sum of money claimed or awarded in compensation for a loss or an injury.

*Webster’s Dictionary of Law* says,

Damage is derived from an old French word “Dam” meaning injury, harm, or from the Latin word “Damnum”, which means financial loss or fine. Damages have the following possible meanings:

1. Loss or harm resulting from injury to person, property or reputation.
2. Damages means damages deemed to compensate the injured party for losses sustained as a direct result of the injury suffered. This is also called compensatory damages.
3. Direct damages means damages for a loss that is an immediate natural and foreseeable result of the wrongful act.
4. Expectation damages or expectancy damages means damages recoverable for breach of contract and designed to put the injured party in the position he or she would have been in had the contract been completed.
5. General damages mean damages for losses (such as pain and suffering, inconvenience, or loss of lifestyle) whose monetary values are difficult to assign.

The compact edition of the *Oxford English Dictionary* defines damages as, “the value estimate in money of something lost or withheld; the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained”.

The *Dictionary of Canadian Law* defines damages as, “Pecuniary compensation for a wrong, either a breach of contract or a tort”.

As can be seen from these definitions it may be that in *Lurincic*<sup>39</sup>, Justice Quinn was right when he said “damages” must be fault based or tort based if you accept some of these dictionary definitions. If the disability were due merely to illness that was not fault based, it would not qualify as “damages”. It may be that disability payments for pain and suffering or inability to work are not exempt property if they are not fault based. It would then be necessary to consider if it would be unconscionable to include the value of the benefits in net family property.

However, if *Webster’s Dictionary of Law* or the *Oxford English Dictionary* is right, the “loss or harm resulting from injury” or the value of something “lost or withheld” or the “compensation for loss or injury sustained” may be damages even though they are not fault related. Then there would be no need to prove them “unconscionable”.

Dictionary definitions can never replace court decisions. Case law that clearly deals with the point (with the exception of Justice Quinn’s decisions) indicates that the value of payments for pain or suffering (regardless of whether it is fault related or not) is exempt property.

It is interesting to note that the *Newfoundland Matrimonial Property Act*<sup>40</sup> provides an exemption for “personal injury awards, except the portion of the award that represents compensation for economic loss”. This does not require a third-party fault, but would not exclude payment for loss of future income or loss of ability to earn income.

The *Alberta Matrimonial Property Act*<sup>41</sup> makes it clear that the damages must be “damages in tort”.

The *British Columbia Family Relations Act*<sup>42</sup> says that a, “disability pension means a benefit paid to a member under a plan as a consequence of a member’s disability”. There is no mention of damages or fault. However, the BC Act includes all pensions as property and does not provide any exemptions.

The *Saskatchewan Matrimonial Property Act*<sup>43</sup>, says,

- 3) Subject to subsection (4), matrimonial property, other than a matrimonial home or household goods, is exempt from distribution pursuant to this Part where that property is:
  - a) an award or settlement of damages in tort in favour of a spouse, unless the award or settlement is compensation for a loss to both

spouses;  
money paid or payable pursuant to an insurance policy that is not paid or payable with respect to property, unless the proceeds are compensation for a loss to both spouses...

The *Nova Scotia Matrimonial Property Act*<sup>44</sup> provides an exemption for “an award or settlement of damages in court in favour of one spouse”.

The *Manitoba Marital Property Act*<sup>45</sup> says, “Damage Award for Personal Injury – This Act does not apply to the proceeds of any damage award or settlement or insurance claim made in favour of a spouse for personal injury, or disability, except to the extent that the proceeds are compensation for loss to both spouses.” But, “rights under a life insurance policy” and “rights under an accident and sickness insurance policy” are both included in family assets. The excluded damages need not be fault based.

Logic would indicate that the only justification for providing an exemption for damages is if the amount(s) is (are) being received for loss or damage that is so personal that only the party receiving the benefit was affected by the loss. This would normally include pain and suffering or from loss of a limb or sight, or some such personal loss.

The court decisions that allowed an exemption seem to be based on this logic. There does not seem to be any logic to limiting the exemption to damages that are fault related or tort related. Justice McKinlay probably said it best in *Mittler v. Mittler*<sup>46</sup> when he said,

In reaching the conclusion that those two amounts may be deducted as property owned on the date of marriage, I have considered what appears to be the policy of the legislature in excluding damages or the right to damages from the calculation of net family property. The purpose can only be to permit spouses to retain for their own purposes property which is completely personal to them, and to which they are entitled for the purpose of replacing some aspect of their enjoyment of life which cannot be truly shared with any other individual, no matter how close the relationship.

However, Section 4(2) paragraph 3 of the *Family Law Act* specifically limits the exemption. Since the section carefully specifies the damages that are exempt, it is reasonable to conclude that damages that are not specified in the section are not exempt.

## **Unconscionable**

Section 5(6) of the *Ontario Family Law Act* provides for unequal division of assets when equal division would be unconscionable. The exact provision of subsection (6) is as follows:

**Variation of share** – The Court may award a spouse an amount that is more or less than half the difference between the net family properties if the Court is of the opinion that equalizing the net family properties would be unconscionable, having regard to:

- a) A spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
- b) The fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
- c) The part of a spouse's net family property that consists of gifts made by the other spouse;
- d) A spouse's intentional or reckless depletion of his or her net family property;
- e) The fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
- f) The fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
- g) A written agreement between the spouses that is not a domestic contract; or
- h) Any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

For the value of a disability benefit to be considered under this section, it would have to meet the definition in either, e, f, g, or h of this section of the *Ontario Family Law Act*.

*Black's Law Dictionary* says, "An unconscionable bargain or contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other". It says, "Unconscionable conduct" is "conduct that is monstrously harsh and shocking to the conscience" and that "unconscious" means, "Not possessed of mind".

*Webster's Dictionary of Law* defines "unconscionable" as "unreasonably unfair to one party, marked by oppression or otherwise unacceptably offensive to public policy." Compare this to the definition of "conscionable" which is "guided by conscience, characterized by fairness and justice".

*The American Heritage Dictionary of the English Language: Fourth Edition* says, that "unconscionable" means "not restrained by conscience; unscrupulous; beyond prudence or reason; excessive".

*Hutchinson's Dictionary of Difficult Words* defines unconscionable as "unreasonable; against the conscience".

*Roget's New Thesaurus*, Third Edition says that, "unconscionable" means "beyond all reason; obscene; outrageous; preposterous; ridiculous; shocking; unreasonable; lacking scruples or principles; ruthless; unethical; unprincipled; unscrupulous".

In the case of *Grant-Hose v. Grant-Hose*<sup>47</sup> Justice Mendes De Costa in the Ontario Unified Family Court, in considering whether or not a matter was unconscionable said, "What is required are circumstances such as to shock the conscience of the Court, whereby the party seeking redress has been placed in a position so unfair as to cry out for relief".

In the case of *Shaver v. Shaver*<sup>48</sup> the same judge said, "Unequal division may be ordered where to do otherwise would be 'patently unfair' or 'inordinately inequitable'. In doing so Mendes De Costa quoted from the case of *Sullivan v. Sullivan*<sup>49</sup>.

In the case of *Brinkos v. Brinkos*<sup>50</sup> in considering whether the equalization was unconscionable the Court of Appeal said,

The husband's record of performance within the marriage and beyond does not say much to commend him and, in fact, if this were a matter of pure discretion, it would be easy to deny him any recovery. However, none of the provisions of s. 5(6) (a) to (g) apply to the circumstances and I cannot bring myself to think that the language of para. (h) raises relevant considerations which could make this payment unconscionable.

In the case of *Fahner v. Fahner*<sup>51</sup>, Justice Gordon concluded that the *CPP* payment was exempt under s. 4(3) of the *Family Law Act*, and then went on to say, "It might well be exempt as unconscionable under s. 5(6) (h)." But he did not explain why.

In *Iurincic v. Iurincic*<sup>52</sup> Justice Quinn said,

The husband did not raise or argue the issue of unconscionability. Nonetheless, I volunteer my view that it would not be unconscionable, in the circumstances of this case, to fully include his disability pension in the equalization process.

In the case of *Snjaric v. Snjaric*<sup>53</sup>, Justice Aston concluded that because of the small amount involved the idea of unconscionability need not be considered. In the case of *MacDonnell v. MacDonnell*<sup>54</sup>, Justice Roscoe said that he agreed with Professor Bissett-Johnson that disability insurance should be exempted from matrimonial assets because it would be unfair to the disabled spouse to include it. He did not give reasons.

Justice Kerr made it clear that, in his opinion, the fact that the disability payment was for suffering meant it met the requirement of “unconscionable” when he said,

While it is not necessary to my decision in view of the above finding, I am of the view that there is another ground upon which I would be prepared to give relief to the petitioner. Section 5(6) of the *Family Law Act* allows me to award to the spouse an amount that is more or less than half the difference between the net family properties if I am of the opinion that equalizing the net family property would be unconscionable having regard to the various types of situations described there under.

It is my opinion that s. 5(6)(h) applies to this case and that the circumstances relating to the acquisition and preservation of this particular asset are such that it would be unconscionable for me to award any sum whatsoever to the respondent by way of equalization of this particular asset. It was the petitioner who suffered and continues to suffer the disability with the attendant pain, and her efforts and hers alone which led to the acquisition of the award. By virtue of her having pursued her remedies through the appeal process over many years, without assistance or encouragement of the respondent, she has been able to realize a small monthly compensation payment. This small payment has reduced her dependence upon the respondent and is reflected in the amount of support payment which he is obliged to make to her for the future. It would be unconscionable to take from her any portion of that award up to the valuation date.

In the case of *Artus v. Artus*<sup>55</sup>, the plaintiff’s disability benefits arose from injuries incurred before his marriage. Justice Errico said that the interest was a family asset but considering the duration of the marriage, the date when the disability was suffered, and the plaintiff’s need for his pension due to his disability, it would be unfair (unconscionable?) for any disposition of the pension other than for the disabled plaintiff to be fully entitled.

Obviously, making a decision of “unconscionable” would require unusual circumstances. Just the fact that the equalization calculation includes the value of a disability benefit would not be sufficient. If there are a lot of other assets too, and the other party is in need, it would not be unconscionable to include the value of the disability benefits in the calculation of Net Family Property.

### ***Canada Pension Plan***

The *Canada Pension Plan* was established in 1966 to provide a retirement pension for everyone who is employed or has self-employment earnings. This retirement pension is payable for life from age 65, but may be commenced on a reduced basis as early as age 60. The amount of retirement pension that an individual receives is based on his

accumulated credits, and the number of years that he has contributed. Each person's contributions are based on his/her annual earnings. The accumulated *CPP* credits are subject to equalization between spouses on marriage breakdown. Canada Pension Plan will do this on application by either party.

The *Canada Pension Plan* also provides a disability pension that is payable to *CPP* participants who are "unable to work due to a severe prolonged and permanent and/or long-term physical or mental disability". Disability pensions are payable up to age 65 (when they are converted to retirement pensions) or until the person recovers from the disability. The monthly amount of the disability benefit is composed of two parts. First there is a flat rate portion that provides the same amount of payment to everyone who qualifies. The second portion is equal to 75% of the *CPP* retirement pension that the disabled applicant would have received at age 65. When a disabled person turns 65, the flat rate portion of his disability benefit ceases, and the portion based on accumulated pension credits is recalculated. There is no doubt whatsoever that the right to receive these benefits is property. Whether or not one or both parts of this disability benefit are excluded property will depend on whether or not they meet the definition of damages under section 4(2) 3 of the *Ontario Family Law Act*.

The case of *Canada (Ministry of National Health & Welfare) v. Blackwood*<sup>56</sup> before the Federal Court of Canada, Appeal Division clarified the fact that the Ministry of National Health & Welfare may divide the unadjusted pensionable earnings of the parties in accordance with the provisions of the *Canada Pension Plan*, notwithstanding an agreement or divorce judgment to the contrary. Therefore, there is no doubt that the sharing of normal *Canada Pension Plan* benefits is dealt with under that Act and not under the *Family Law Act* of Ontario. However, this equalization of unadjusted pensionable earnings applies only to the earnings related retirement portion of the disability pension. It does not apply to the flat rate portion. Only the disabled person may receive any part of the flat rate portion of the disability benefit.

Since the flat rate portion of the disability benefit is the same amount for everyone who qualifies, and since it is not related to earnings and only the disabled person can receive any part of it, there is an argument that at least the flat rate portion of the disability benefit is for damages and would qualify as excluded property, but in at least some cases this would be true only if you accept the court decisions that indicated that damages need not be fault related or tort related. The flat rate portion would not be exempt if the disability was due to illness and not damages.

The value of the portion of the *CPP* disability benefit that is based on the person's accumulated pension credits should not be included as property because of the law of paramountcy. These credits are equalized between the parties on marriage breakdown by the *Canada Pension Plan* and therefore this part of the value should not be included in the sharing of property under provincial laws (with the possible exception of provinces that allow the parties to opt out of the *CPP* provision to split credits).

The cases of *Fahner*<sup>57</sup>, *West*<sup>58</sup> and *Wood*<sup>59</sup> determined that *Canada Pension Plan* disability benefits were exempt. However, the cases of *Birce*<sup>60</sup>, *Snjaric*<sup>61</sup>, *Inverarity*<sup>62</sup> and *Stewart*<sup>63</sup> determined that they were not exempt, as they did not meet the definition of damages. In *Fahner*<sup>64</sup> it was said that it might be unconscionable. Most cases did not differentiate between the two parts of the C.P.P. disability benefit.

The two cases that recognized that the *Canada Pension Plan Act* would over ride were the Saskatchewan case of *Czemes*<sup>65</sup> and the Nova Scotia case of *MacDonnell*<sup>66</sup>.

In *Stewart v. Stewart*<sup>67</sup>, Justice Riopelle recognized that the value of a flat rate C.P.P. disability benefit being paid due to illness must be included in Net Family Property.

## **Workplace Safety and Insurance Board (Formerly Workers' Compensation Board)**

As explained in *Division of Pensions*<sup>68</sup>,

Each province and territory in Canada has legislation to provide compensation to a worker or a worker's family where injury to the worker or death of the worker results from employment. The employer pays premiums based on an industrial and company assessment rate. The worker's compensation program replaces the worker's right of legal action against the employer for injuries or death arising from employment.

Worker's compensation benefits include those for temporary disability, permanent disability, health care benefits and spousal and dependants' benefits.

Generally, worker's compensation benefits have been held not to be matrimonial property, or not to be property for the purposes of equalization under a matrimonial property statute. The actual characterization of the benefits payable will depend in part on the provisions in the relevant worker's compensation statute under which the benefit arises.

The Ontario *Workers' Compensation Act* Section 42 (for injuries or accidents before January 1, 1998) provides that, "A worker who suffers permanent impairment as a result of an injury is entitled to receive compensation for non-economic loss in addition to any other benefit receivable under this Act." *Workplace Safety and Insurance Act*<sup>69</sup> Section 46 (for injuries or accidents after January 1, 1998) provides that, "If a worker's injury results in permanent impairment, the worker is entitled to compensation under this section for his or her non-economic loss." The Acts do not define non-economic loss; however the amount paid has no relationship to the worker's previous or future earnings and is obviously payment for the existing and anticipated likely future consequences of the injury or for pain and suffering.

Section 43 of the *Workers' Compensation Act* provides compensation for future loss of earnings arising from the injury. This compensation ceases when the worker reaches 65 years of age. He then receives a retirement pension under the Act.

Section 16 of the *Workers' Compensation Act* provides that, "The provisions of this Part are in lieu of all rights and rights of action, statutory or otherwise, to which a worker or the members of his or her family are or may be entitled against the employer of such worker, or any executive officer thereof, for or by reason of any accident happening to the worker...while the worker was in the employment of the employer", and clearly says that the employee has no action against the employer for such injury.

The payments from the Workplace Safety and Insurance Board (WSIB) for non-economic loss must be for pain and suffering and possibly for the loss of the ability to earn income. These are personal considerations, and therefore, might be classified as exempt property or perhaps unconscionable.

The payments under either section of the Act are in lieu of all rights to claim damages.

In the case of *Arvelin v. Arvelin*<sup>70</sup>, Justice Wright said,

Are these benefits excluded? If we proceed on the basis that Section 4(2) 3 of the *Family Law Act* applies only to "general" damages (for pain and suffering) and not to "special" damages (for loss of income) then we must determine whether the Workers' Compensation payments fall within the former or latter classification. According to Exhibit 30 these payments were made as temporary total disability benefits. Temporary total disability benefits are paid under Section 37 of the *Workers' Compensation Act*. Payments under that section are based on 90% of the loss of net average earnings. These payments were intended as income replacement and are not excluded.

He therefore required that the value of the *Workers' Compensation Act* disability benefits be included. Justice Wright did not consider whether or not this would be unconscionable.

In *Buske v. Buske*<sup>71</sup>, *Kelly v. Kelly*<sup>72</sup>, *Snjaric v. Snjaric*<sup>73</sup> it was determined that the Workers' Compensation Board (WCB) benefits qualified as damages and were exempt property.

In the case of *Kelly v. Kelly*<sup>74</sup>, Justice Kerr held the benefits to be excluded by virtue of section 4(2) 3 of the *Family Law Act*. He went on to say,

While it is not necessary to my decision in view of the above finding, I am of the view that there is another ground upon which I would be prepared to give relief to the petitioner. Section 5(6) of the *Family Law Act* allows

me to award to the spouse an amount that is more or less than half the difference between the net family properties if I am of the opinion that equalizing the net family property would be unconscionable having regard to the various types of situations described thereunder.

It is my opinion that s. 5(6) (h) applies to this case and that the circumstances relating to the acquisition and preservation of this particular asset are such that it would be unconscionable for me to award any sum whatsoever to the respondent by way of equalization of this particular asset. It was the petitioner who suffered and continues to suffer the disability with the attendant pain, and her efforts and hers alone which led to the acquisition of the award. By virtue of her having pursued her remedies through the appeal process over many years, without assistance or encouragement of the respondent, she has been able to realize a small monthly compensation payment. This small payment has reduced her dependence upon the respondent and is reflected in the amount of support payment which he is obliged to make to her for the future. It would be unconscionable to take from her any portion of that award up to the valuation date.

## **Other Disability Benefits**

In the case of *McTaggart v. McTaggart*<sup>75</sup>, Justice Huneault had to deal with a case where Mr. McTaggart was receiving disability benefits from a retirement pension plan. Justice Huneault said,

After 25 years of employment with Inco, the respondent's various heart ailments rendered him physically unable to continue working.

The Inco pension plan is fully funded by the employer. Under this plan, an employee can become eligible for retirement benefits in a number of ways:

- 12(a) normal service retirement
- 13(b) early service retirement
- 14(c) 30-year early service retirement
- 15(d) late service retirement
- 16(e) disability retirement.

In view of his age and years of service, the respondent's only option was to seek a disability retirement pension based on his total and permanent disability as defined in the plan.

He went on to say,

In the case at bar, it is clear from the Inco Pension Plan Manual (Exhibit 5) that the disability benefits paid to the respondent are part and parcel of an overall employee pension benefit plan totally funded by the company. The witness, Terry Duncan, supervisor of benefits for Inco, has testified that the benefits received by the respondent represent a level of income earned by the employee for services rendered. It is clearly, therefore, a benefit related to services rendered to the company and not as compensation for his disability. By no stretch of the imagination can it be considered as “damages” and thereby excluded under the Act.

Justice Quinn had to deal with the same thing in *Lurincic v. Lurincic*<sup>76</sup>. He carefully considered the decisions in previous cases. Justice Quinn commenced his decision by saying, “I confess that there is one word which, given the choice, I would prefer not to hear in a matrimonial proceeding: ‘pension’.” The husband, as a result of a back injury qualified for a disability pension from OMERS. The disability was calculated taking into account the husband’s pensionable earnings and the number of years of credited service. When he retires, the disability pension is replaced by a retirement pension. Justice Quinn disagreed with the decision in *Kelly v. Kelly*<sup>77</sup>, because in his opinion, damages must include the element of fault or wrongdoing. After a lengthy explanation of each of the cases considered and giving his comments on each, Justice Quinn said,

I fail to see how there can be any doubt that the disability pension is property. Apart from adding words such as, “everything under the sun”, it is difficult to imagine how s.4 (1) could be drafted with a broader compass.

In most, if not all, of the cases where a disability pension has been found to be excluded property, it has been because the pension was seen as damages or the equivalent of damages under s. 4(2) 3. As I explained earlier, the definition of damages adopted by the court in *Kelly v. Kelly, supra*, and by subsequent courts, omits what I regard as the essence of damages; the element of fault or of wrongdoing. In my view, the language of s. 4(2) 3 bespeaks fault-based or tort-based compensation. Consequently, benefits paid under workers’ compensation legislation for work-related injuries would not be caught by s. 4(2) 2 since such legislation is not fault-based; it provides benefits regardless of fault or wrongdoing and in lieu of a worker’s right to sue for damages. It is noteworthy that the words “illness” or “sickness” do not appear in s. 4(2) 3 and, in my opinion, neither is commonly thought of as being a personal injury.

In the result, the disability pension being received by the husband is not excluded property under s. 4(2).

The husband did not raise or argue the issue of unconscionability. Nonetheless, I volunteer my view that it would not be unconscionable, in the circumstances of this case, to fully include his disability pension in the

equalization process.

He did not explain why it would not be unconscionable.

In *Vanderaa v. Vanderaa*<sup>78</sup>, subsequent to the date of separation, both parties settled their actions for damages arising from a motor vehicle accident, which occurred prior to the date of separation. Justice Leitch said,

The cause of action which resulted in the settlements in favour of the petitioner and respondent existed prior to the date of separation and accordingly, the settlement monies are property within the definition of property set out in s. 4(1) of the Act. There is no question that the amounts received by the petitioner and the respondent as general damages are excluded property with the meaning of s. 4(2) para.3 of the Act as those amounts clearly represent compensation for personal injuries...

The contentious issue in this trial is the extent, if any, to which the settlements for past wage loss and for future loss of income should be excluded.

He went on to say,

In my view there is a distinction between compensation for retraining, rehabilitation or loss of competitive advantage and damages resulting from a measurable wage loss. The first category of damages is personal and is of the nature meant to be excluded by para.3 of s. 4(2) and the latter category of damages is not in the words of *Mittler v. Mittler* completely personal to the recipient and for the purpose of replacing some aspect of their enjoyment of life which cannot be truly shared with any other individual no matter how close their relationship.

Compensation for a wage loss which accrued during a period prior to the date of separation is sharable property. Such damages are not paid for the injury itself and are paid to replace lost wages and, in essence, are income replacement and should be shareable to the extent that they replace income that would have been earned but for injuries sustained prior to the date of separation...A party's right to claim lost income is a property right and therefore the value of this property right as at the valuation date should be included in net family property. This interpretation provides a logical result because damages that compensate for sharable property ought to be shared and included in the calculation of net family property.

However, the value of the right to claim lost income as at the valuation date would not include the amount of damages paid to replace lost wages

which would have been earned after the date of separation. This also provides a reasonable result because these monies would not have been shared in any event and should be excluded from the calculation of net family property as at the valuation date.

He then said, “Similarly, I find that these settlements for future wage loss are within the category of damages that are completely personal to the parties and are therefore excluded from their net family property pursuant to para. 3 of s. 4(2) of the Act.”

Mr. Vanderaa was also receiving benefits under a long-term disability plan provided by his employer. Justice Leitch said,

In this case the respondent’s disability pension cannot be considered tantamount to a retirement pension. The disability pension is not the hybrid disability/retirement pension considered by the court in *McTaggart*. This pension is like the type of pension considered in *Pallister* and *Balcombe*. The benefits paid to the respondent are paid to compensate him for his disability. The benefits are not paid because of years of service rendered to his former employer.

He went on to say,

The respondent’s right to these disability benefits is within the very broad definition of “property” set out in s. 4(1) of the *Family Law Act*. However, I would exclude the value of these benefits from the respondent’s net family property pursuant to s. 4(2) para. 3 of the *Family Law Act*, having classified them as compensation for personal injury.

In *Stewart v. Stewart*<sup>79</sup> Justice Riopelle recognized that the value of payments from a privately owned life and disability insurance policy must be included in Net Family Property.

The attached analysis of cases shows the apparent reasoning for each decision but also shows some of what appear to be inconsistencies. Knowing the exact facts of each case would help in the understanding of the decisions.

## Workers' Compensation

<b>Name</b>	<b>Year</b>	<b>Court</b>	<b>Decision</b>	<b>Remarks</b>
<i>Arvelin</i> See Endnote 4	1996	Gen. Div.	<b>Not excluded</b>	Intended as income replacement
<i>Buske</i> See Endnote 71	1988	Dist. Ct.	Excluded	Not a pension – Not property – Damages – payment for personal injury
<i>Kelly</i> See Endnote 12	1987	High Ct.	Excluded	Damages – payment for personal injury
<i>Onofrio</i> See Endnote 17	2002	Superior Ct.	Past payments <b>not</b> excluded	Not identified as damages
<i>Onofrio</i> See Endnote 17	2002	Superior Ct.	Future payments excluded	Not Property – not vested because could cease
<i>Rohl</i> <sup>80</sup>	1993	A.B. Ct. of Queen's Bench	WCB lump sum pmt. Used to pay down mortgage ∴ it became matrimonial property and is <b>not</b> exempt	At first WCB received as monthly benefit then Rohl applied to receive a lump sum ending monthly pmts. Part of lump sum used to pay down family debt, part applied to mortgage. As soon as the WCB funds were transferred into something that was family property it lost its exemption as a benefit for damages
<i>Smith</i> <sup>81</sup>	1996	Ont. Gen. Div.	Lump sum received during marriage <b>not</b> excluded	Replaces income that would have been earned during marriage
<i>Smith</i> See Endnote 81	1996	Ont. Gen. Div.	Lump sum received after marriage breakdown excluded	Replacement of post-separation wages
<i>Snjaric</i> See Endnote 20	1999	Ont. Gen. Div.	Excluded	Damages for personal injury
<i>Yee</i> See Endnote 16	1990	Ct. of Appeal	Value accrued before marriage deductible as property	No reasons given

### **Canada Pension Plan**

<b>Name</b>	<b>Year</b>	<b>Court</b>	<b>Decision</b>	<b>Remarks</b>
<i>Birce</i> See Endnote 6	2000	Superior Ct.	<b>Not</b> excluded	Disability severe and prolonged
<i>Bouey</i> <sup>82</sup>	1991	S.K. Ct. of Q.B.	<b>Not</b> excluded	Act has no provision to exclude this
<i>Czemerer</i> See Endnote 31	1991	S.K. Ct. of Q.B.	Excluded	Court wrongly understood that benefit based on credits
<i>Fahner</i> See Endnote 8	1994	Ont. Gen. Div	Excluded	Compensation for disability
<i>Goldfarb</i> <sup>83</sup>	1992	Ont. Gen. Div.	<b>Not</b> excluded	Based on both parties' credits having been equalized
<i>Pollock</i> <sup>84</sup>	1985	M.B.	<b>Not</b> excluded	Payment for inability to work, not compensation for disability itself
<i>Snjaric</i> See Endnote 20	1999	Ont. Gen. Div.	<b>Not</b> excluded	Not damages – to compensate for lost wages

### **Employment Pension**

<b>Name</b>	<b>Year</b>	<b>Court</b>	<b>Decision</b>	<b>Remarks</b>
<i>Brignolio</i> See Endnote 29	1997	Gen. Div.	Excluded	A true disability pension
<i>Iurincic</i> See Endnote 11	1998	Gen. Div.	<b>Not</b> excluded	Not for damages
<i>McTaggart</i> See Endnote 35	1993	Gen. Div.	<b>Not</b> excluded	Part of normal pension plan and so not for damages
<i>McKenzie</i> See Endnote 104	2002	Gen. Div.	<b>Not</b> excluded	Not for damages – valued including future years

## Insurance

Name	Year	Court	Decision	Remarks
<i>Mead</i> See Endnote 18	1990	Gen. Div.	<b>Not</b> property	Would be unconscionable anyway
<i>Stewart</i> See Endnote 63	2001	Superior Ct.	<b>Not</b> excluded	Not tort damages
<i>McKenzie</i> See Endnote 104	2002	Gen. Div.	<b>Not</b> excluded	For illness – not damages

## Accident Claims

Name	Year	Court	Decision	Remarks
<i>Kowalski</i> See Endnote 13	1997	Gen. Div.	General damages and special damages excluded	For pain and suffering
<i>Kowalski</i> See Endnote 13	1997	Gen. Div.	FLA claims, future lost income, loss of sick benefits & loss of gratuity <b>not</b> excluded	Received as loss of income that would otherwise be available to the family if not for the separation. Disagreed with <i>Vanderaa</i>
<i>Shaver</i> See Endnote 32	1991	Unified Family Ct.	Payment for general damages excluded	Completely personal
<i>Shaver</i> See Endnote 32	1991	Unified Family Ct.	Payment for lost wages <b>not</b> excluded	Does not meet statutory test
<i>Vanderaa</i> See Endnote 28	1995	Ont. Gen. Div.	Payment for wages lost during marriage <b>not</b> excluded	If income earned it would have been shared
<i>Vanderaa</i> See Endnote 28	1995	Ont. Gen. Div.	Payment for future wage losses excluded	Damages because completely personal
<i>Vanderaa</i> See Endnote 28	1995	Ont. Gen. Div.	Employer pension valued including future service	Pension fully earned at date of separation as no more service or contributions required.

## Other Cases Considered

Name	Year	Court	Decision	Remarks
<i>Abate</i> <sup>85</sup>	1988	Ont. H. Ct. J. and Ont. Ct. of Appeal	Pension in Pay is property	Decided under old Act.
<i>Balcombe</i> See Endnote 5	1990	Ont. Div. Ct.	Disability pension excluded	Reasons not given
<i>Blackwood</i> See Endnote 56	1993	Federal Ct. of Appeal	<i>CPP.</i> unadjusted pensionable earnings to be divided as per <i>CPP. Act</i>	This does not affect the flat rate part of a <i>CPP.</i> disability pension as it is not based on unadjusted pensionable earnings
<i>Brinkos</i> See Endnote 2	1989	Ont. Supreme Ct., Ct. of Appeal	Right to future income from trust is property and <b>not</b> excluded	Meets the definition of property
<i>De Champlain</i> <sup>86</sup>	1986	Ont. H. Ct. J.	Malpractice award excluded	Damages
<i>Dixon</i> <sup>87</sup>	1981	M.B. Ct.	Workers' Compensation benefits received during marriage <b>not</b> excluded	Paid to replace lost wages that would have been shared
<i>Docherty</i> <sup>88</sup>	1992	Ont. Gen. Div.	Payment for lost commission <b>not</b> excluded	Not Damages
<i>Eckert</i> <sup>89</sup>	1987	B.C.S.C.	Workers' Compensation payments excluded	Did not meet the definition of Family assets
<i>Entesary</i> <sup>90</sup>	1995	B.C.S.C.	Workers' Compensation payments excluded	Not a pension or Family asset – payments for damage award
<i>Girouard</i> <sup>91</sup>	1992	M.B. Family Div.	Payments from accident settlement for wages lost during <b>not</b> excluded	Not paid for disability or injury
<i>Higgins</i> See Endnote 15	1993	N.B. Ct. Family Div.	Disability payments <b>not</b> excluded	Met the definition of property, family assets and marital property
<i>Hiscock</i> <sup>92</sup>	1985	N.F. U.F.C.	Benefits from disability provision in employer's pension <b>not</b> excluded	Meets definition of pension

<i>Hughes</i> See Endnote 9	1998	A.B. Ct. of Appeal	Both temporary and permanent disability payments not excluded	Did not meet the definition of damages
<i>Inverarity</i> See Endnote 10	1993	A.B. Queen's Bench	Disability payments from employment pension <b>not</b> excluded	Disability occurred and all contributions made during marriage
<i>Inverarity</i> See Endnote 10	1993	A.B. Queen's Bench	C.P.P. Disability pension <b>not</b> excluded	Disability occurred and all contributions made during marriage
<i>Jarvis</i> <sup>93</sup>	1982	B.C.S.C.	Disability Pension excluded	Awarded for injury sustained before marriage
<i>Jiwa</i> <sup>94</sup>	1992	B.C. Ct. of Appeal	Disability Insurance payments <b>not</b> excluded	Included as family asset since it provided security for the family
<i>Leger</i> See Endnote 14	1994	N.B. Ct. of Appeal	Disability insurance payments excluded because they were insurance	Not marital property
<i>Meier</i> <sup>95</sup>	1995	B.C. Ct. of Appeal	Disability payments included	Payments for lost income
<i>Mittler</i> See Endnote 33	1988	Ont. H.C.J.	Excluded as damages	Probably did not really qualify as damages
<i>Murray</i> <sup>96</sup>	1994	A.B. Ct. of Appeal	Insurance payments included	Payments income replacement
<i>Ormerod</i> <sup>97</sup>	1991	Ont. U.F.C.	Interest on damages award excluded	
<i>Pallister</i> <sup>98</sup>	1990	Ont. Gen. Div.	Not property	Disability happened before marriage
<i>Pollock</i> See Endnote 84	1985	M.B.	Disability benefits under <i>RCMP Act</i> excluded	Awarded for disability itself, not lost wages,
<i>Robichaud</i> <sup>99</sup>	1988	B.C.	Disability benefits from Armed Forces pension excluded	Not a family asset
<i>Rohl</i> See Endnote 80	1993	A.B. Ct.	Workers' Compensation benefits <b>not</b> excluded	Qualified as matrimonial property, and not damages
<i>Smith</i> <sup>100</sup>	1986	B.C.S.C.	Workers' Compensation benefits excluded	Because of provisions of Sect. 15 and 98(4) of <i>Workers' Compensation Act</i>
<i>Webb</i> <sup>101</sup>	1985	B.C.S.C.	Disability insurance payments <b>not</b>	Included as a pension since contributions made

			excluded	during marriage
<i>Wood</i> See Endnote 59	2000	B.C. Supreme Ct.	CPP disability payments excluded	Illness triggered the payments
<i>Young</i> <sup>102</sup>	1986	B.C. Supreme Ct.	Workers' Compensation payments excluded	Compensation for injury
<i>Young</i> See Endnote 102	1986	B.C. Supreme Ct.	CPP disability payments <b>not</b> excluded	Conceded

## Special Considerations

In some cases, the disability insurance can affect the value of the retirement pension. Some pension plans (e.g. Ontario Teachers Pension Plan) provide that when the member becomes disabled, they acquire the right to have all service to the date of their retirement included in the calculation of their pension benefit. Obviously this provision makes a disabled person's deferred pension more valuable than a regular pension, which requires continued years of work in order to have more years included in the calculation of the benefit. Justice Leitch recognized this in *Vanderaa*<sup>103</sup> when he accepted a value based on the retirement method and rejected the valuation based on the termination method. Justice Glass also recognized this in the case of *McKenzie*<sup>104</sup>

## Summary

It is clear that the right to receive disability benefits is property regardless of the source of or reasons for the payments. However, disability benefits may qualify as being excluded property in some cases. They clearly qualify if they are damages that are fault related and meet the specific definition in Section 4(2) paragraph 3 of the *Family Law Act*.

The source of the payments or who funds them does not determine whether they are excluded or not. It should not matter whether the payments are tort related or not, whether they are for lost past wages or whether they are for lost future wages. The determining factor is; are they damages that are specified in the *Family Law Act*?

Benefits from C.P.P. for loss of ability to earn income due to illness do not qualify as damages and are not exempt even though some judges seem to have treated them as such.

In some cases if it is determined that the disability benefits are not exempt property, it would be unconscionable to include their value in the equalization of assets.

All of the foregoing is true, regardless of the type of disability benefit that is being considered, except for the part of the disability benefit that is paid from *Canada Pension Plan* that is related to accumulated pension credits. The latter should be excluded since it is dealt with under the *Canada Pension Plan*, a federal act.

As with so many things, the decision will depend on the facts of the particular case. Some disability benefits are clearly exempt and some are clearly not exempt. But:

- All are property,
- Benefits that are clearly “damages for personal injury, nervous shock, mental distress or loss of guidance care and companionship” are not part of family property,
- Benefits that do not meet the above definition (e.g. due to illness) are not exempt under the F.L.A.,
- In rare circumstances it would be appropriate to omit the value of these benefits from net family property if it would be unconscionable to include them.

Unless it can be proven otherwise I would expect that:

Disability payments from a normal retirement pension plan probably meet the definition of property as set out in Section 4(1) of the *Ontario Family Law Act* and are **not** excluded, because they are payments from a pension that has vested.

Payments from a long-term disability plan (whether employer sponsored or privately owned) could hardly be for damages and are **not** excluded.

Payments from Workplace Safety and Insurance Board probably are payments for damages and should be exempt as damages as long as they meet the precise requirements of Section 4(2) paragraph 3 of the *Family Law Act* (personal injuries, nervous shock, mental distress or loss of guidance, care and companionship).

The part of *CPP* disability benefits that is based on accumulated credits is exempt because the *CPP* Act provides for equalization of that part. The flat rate part of the *CPP* disability benefits is **not** excluded because the *CPP* Act specifically says it is paid for the loss of the ability to earn income and therefore, it does not meet the definition in Section 4(2) paragraph 3 of the *Family Law Act* and *CPP* will not divide this benefit.

Payments from one’s own accident and sickness insurance policy are probably **not** exempt as they would not be for damages.

Disability payments from one’s own life insurance policy are **not** excluded as they would not be for damages and are not “payable on death”.

It is hoped that the above will assist to clarify this when some disability benefits are excluded and when they are not excluded.

Accident claims may give rise to both excluded property and non-included property.

It would be helpful if future decisions made it clear whether or not the benefits were determined to be property subject to the provisions of the *Ontario Family Law Act*, whether or not they were determined to be exempt (e.g. as damages) and whether or not it would be considered unconscionable to include their value in the equalization of property (with reasons for each).

It has sometimes been suggested that if the disability benefit ceases on the person recovering, that the value should be discounted to allow for this possibility (e.g. see comments of James McLeod in *Onofrio*<sup>105</sup>). In my opinion this would only be appropriate if it was known at the date of separation just when the date of recovery would be (just as in a normal pension valuation the assumed date of retirement is based on the facts at the date of separation). Any other recovery would be a post-separation event and should not be considered.

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<sup>1</sup> *Family Law Act*, 1990, R.S.O. c. F.3

<sup>2</sup> *Brinkos v. Brinkos* (1986) CarswellOnt 324, 4 R.F.L. (3d) 381, 25 E.T.R. 81

<sup>3</sup> *Clarke v. Clarke* (1990) CarswellNS 49, 28 R.F.L. (3d) 113, 73 D.L.R. (4<sup>th</sup>) 1, 113 N.R. 321, [1990] 2 S.C.R. 795, 101 N.S.R. (2d) 1, 275 A.P.R. 1

<sup>4</sup> *Arvelin v. Arvelin* (1996) CanRepOnt 394, 20 R.F.L. (4<sup>th</sup>) 87

<sup>5</sup> *Balcombe v. Balcombe* (1990) CarswellOnt 322, 30 R.F.L. (3d) 177, 42 O.A.C. 150

<sup>6</sup> *Birce v. Birce* (2001) CarswellOnt 3481

<sup>7</sup> *Brinkos v. Brinkos* (1989) CarswellOnt 252, 20 R.F.L. (3d) 445, 69 O.R. (2d) 225, 60 D.L.R. (4<sup>th</sup>) 556, 33 O.A.C. 295, 34 E.T.R. 55

<sup>8</sup> *Fahner v. Fahner* (1994) CarswellOnt 2036

<sup>9</sup> *Hughes v. Hughes* (1998) CarswellAlta 1206, 168 D.L.R. (4<sup>th</sup>) 112, 43 R.F.L. (4<sup>th</sup>) 319, [1999] 6 W.W.R. 243, 232 A.R. 224, 195 W.A.C. 224, 70 Alta. L.R. (3d) 380

<sup>10</sup> *Inverarity v. Inverarity* (1993) CanRepAlta 456, 50 R.F.L. (3d) 251, 146 A.R. 389

<sup>11</sup> *Iurincic v. Iurincic* (1998) CanRepOnt 2263

<sup>12</sup> *Kelly v. Kelly* (1987) CanRepOnt 329, 8 R.F.L. (3d) 212

<sup>13</sup> *Kowalski v. Kowalski* (1997) CarswellOnt 4598, [1997] O.J. No. 4050

<sup>14</sup> *Leger v. Leger* (1994) CarswellNB 18, 1 R.F.L. (4<sup>th</sup>) 294, 111 D.L.R. (4<sup>th</sup>) 76, 143 N.B.R. (2d) 148, 366 A.P.R. 148

<sup>15</sup> *Higgins v. Higgins* (1993) CarswellQue 56, 1 R.F.L. (4<sup>th</sup>) 306

<sup>16</sup> *Yee v. Yee* (1990) CanRepOnt 236, 25 R.F.L. (3d) 366

<sup>17</sup> *Onofrio v. Onofrio* (2002) CarswellOnt 288, 22 R.F.L. (5<sup>th</sup>) 379

<sup>18</sup> *Mead v. Mead* (1990) CanRepOnt 334, 31 R.F.L. (3d) 101, 2 O.R. (3d) 49

<sup>19</sup> *Insurance Act*, R.S.O. 1980

<sup>20</sup> *Snjaric v. Snjaric* (1999) CarswellOnt 1073, C.E.B. & P.G.R. 8357

<sup>21</sup> *Workers' Compensation Act*, R.S.O. 1990, c. W.11, Ontario

<sup>22</sup> *Canada Pension Plan*, R.S.C. 1985, c. C-8.

<sup>23</sup> See Endnote 6.

<sup>24</sup> See Endnote 20.

<sup>25</sup> See Endnote 5.

<sup>26</sup> See Endnote 8.

<sup>27</sup> See Endnote 12.

<sup>28</sup> *Vanderaa v. Vanderaa* (1995) CanRepOnt 685, 18 R.F.L. (4<sup>th</sup>) 393

<sup>29</sup> *Brignolio V. Brignolio* (1997) CarswellOnt 1340, 29 O.T.C. 251

<sup>30</sup> *MacDonnell v. MacDonnell* (1991) CanRepNS 55, 33 R.F.L. (3d) 52, 103 N.S.R. (2d) 435, 282 A.P.R. 435

<sup>31</sup> *Czemereres v. Czemereres* (1991) CanRepSask 53, 32 R.F.L. (3d) 243, 92 Sask. R.1

<sup>32</sup> *Shaver v. Shaver* (1991) CarswellOnt 346, 37 R.F.L. (3d) 117

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- <sup>33</sup> *Mittler v. Mittler* (1988) CarswellOnt 303, 17 R.F.L. (3d) 113
- <sup>34</sup> See Endnote 11.
- <sup>35</sup> *McTaggart v. McTaggart* (1993) CarswellOnt 366, 50 R.F.L. (3d) 110
- <sup>36</sup> See Endnote 13.
- <sup>37</sup> See Endnote 32.
- <sup>38</sup> See Endnote 28.
- <sup>39</sup> See Endnote 11.
- <sup>40</sup> *Newfoundland Matrimonial Property Act*, S.N. 1979, c.32 [repealed 1988, c.60,s.84]
- <sup>41</sup> *Alberta Matrimonial Property Act*, R.S.A. 1980, C. M-9.
- <sup>42</sup> *British Columbia Family Relations Act*, S.B.C.A 1978, c.20
- <sup>43</sup> *Saskatchewan Matrimonial Property Act*, S.S. 1979, c.M-6.1
- <sup>44</sup> *Nova Scotia Matrimonial Property Act*, S.N.S. 1980, c.9
- <sup>45</sup> *Manitoba Matrimonial Property Act*, C.C.S.M., c. M45
- <sup>46</sup> See Endnote 33.
- <sup>47</sup> *Grant-Hose v. Grant-Hose*, (1991) 32 R.F.L. (3d) 26 (Ont. U.F.C.)
- <sup>48</sup> See Endnote 32.
- <sup>49</sup> *Sullivan v. Sullivan*, (1986) 5 R.F.L. (3d) 28 (Ont. U.F.C.)
- <sup>50</sup> See Endnote 2 & 7.
- <sup>51</sup> See Endnote 8.
- <sup>52</sup> See Endnote 11.
- <sup>53</sup> See Endnote 20.
- <sup>54</sup> See Endnote 28.
- <sup>55</sup> *Artus v. Artus*, (1985) W.D.F.L. 827 (B.C.S.C.)
- <sup>56</sup> *Canada (Minister of National Health & Welfare) v. Blackwood*, (1993) CarswellNat 11, 3 R.F.L. (4<sup>th</sup>) 337, 169 N.R. 236, C.E.B. & P.G.R. 8184
- <sup>57</sup> See Endnote 8.
- <sup>58</sup> *West v. West*, (1997) CarswellOnt 3944, 33 R.F.L. (4<sup>th</sup>) 56
- <sup>59</sup> *Wood v. Wood*, (2000) CarswellBC 2601, 2000 B.C.S.C. 1647
- <sup>60</sup> See Endnote 6.
- <sup>61</sup> See Endnote 20.
- <sup>62</sup> See Endnote 10.
- <sup>63</sup> *Stewart v. Stewart*, (2001) CarswellOnt 4624
- <sup>64</sup> See Endnote 8.
- <sup>65</sup> See Endnote 31.
- <sup>66</sup> See Endnote 30.
- <sup>67</sup> See Endnote 63.
- <sup>68</sup> E. Diane Pask, Cheryl A. Hass, *Division of Pensions*, (Carswell, A Division of Thomson Canada Limited, 1996), page II-47.
- <sup>69</sup> *Workplace Safety and Insurance Act*, 1997
- <sup>70</sup> See Endnote 4.
- <sup>71</sup> *Buske v. Buske*, (1988) CanRepOnt 210, 12 R.F.L. (3d) 388, 63 O.R. (2d) 749
- <sup>72</sup> See Endnote 12.
- <sup>73</sup> See Endnote 20.
- <sup>74</sup> See Endnote 12.
- <sup>75</sup> See Endnote 35.
- <sup>76</sup> See Endnote 11.
- <sup>77</sup> See Endnote 12.
- <sup>78</sup> See Endnote 28.
- <sup>79</sup> See Endnote 63.
- <sup>80</sup> *Rohl v. Rohl* (1993) CarswellAlta 448, 48 R.F.L. 93d) 220, 140 A.R. 229
- <sup>81</sup> *Smith v. Smith* (1996) CarswellOnt 1189, 22 R.F.L. (4<sup>th</sup>) 228
- <sup>82</sup> *Bouey v. Bouey* (1991) CanRepSask 46, 31 R.F.L. (3d) 27, 89 Sask. R. 179
- <sup>83</sup> *Goldfarb v. Goldfarb*, Docket No. 1564/88, Ont. Ct. Gen. Div., Justice MacLeod
- <sup>84</sup> *Pollock v. Pollock* (1985) CanRepMan 136, 37 Man. R. (2d) 161
- <sup>85</sup> *Abate v. Abate* (1988) CanRepOnt 308, 17 R.F.L. (3d) 251

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- <sup>86</sup> *de Champlain v. de Champlain* (1986) CarswellOnt 261, 2 R.F.L. (3d) 22
- <sup>87</sup> *Dixon v. Dixon* (1981) CanRepMan 41, 25 R.F.L. (2d) 266, 14 Man. R. (2d) 40
- <sup>88</sup> *Docherty v. Docherty* (1992) CarswellOnt 286, 42 R.F.L. (3d) 87
- <sup>89</sup> *Eckert v. Eckert* (1987) CarswellBC 843
- <sup>90</sup> *Entesary v. Entesary* (1996) CanRepBC 813
- <sup>91</sup> *Girouard v. Girouard* (1992) CarswellMan 39, 40 R.F.L. (3d) 157, 79 Man. R. (2d) 274
- <sup>92</sup> *Hiscock v. Hiscock* (1985) CarswellNF 112, 72 NFLD & PEI, R 40, 223 A.P.R. 40
- <sup>93</sup> *Jarvis v. Jarvis* (1982) CarswellBC 575, 32 R.F.L. (2d) 144
- <sup>94</sup> *Jiwa v. Jiwa* (1992) CarswellBC 286, 72 B.C.L.R. (2d) 96, 42 R.F.L. (3d) 388, 12 C.C.L.I. (2d) 54, 97 D.L.R. (4<sup>th</sup>) 252, 19 B.C.A.C., 114, 34 W.A.C., 114, 12 C.C.L.I. (2d) 54
- <sup>95</sup> *Meier v. Meier* (1995) CarswellBC 1092, 17 R.F.L. (4<sup>th</sup>) 40, 64 B.C.A.C. 117, 105 W.A.C. 117
- <sup>96</sup> *Murray v. Murray* (1994) CarswellAlta 361, 10 R.F.L. (4<sup>th</sup>) 60, 157
- <sup>97</sup> *Ormerod v. Ormerod* (1991) CarswellOnt 300, 34 R.F.L. (3d) 319, 83 D.L.R. (4<sup>th</sup>) 490
- <sup>98</sup> *Pallister v. Pallister* (1990) CarswellOnt 313, 29 R.F.L. (3d) 395
- <sup>99</sup> *Robichaud v. Robichaud* (1988) CanRepBC 608, 17 R.F.L. (3d) 285
- <sup>100</sup> *Smith v. Smith* (1986) CanRepBC 511, 1 R.F.L. (3d) 219
- <sup>101</sup> *Webb v. Webb* (1985) CanRepBC 408, 70 B.C.L.R. 15, 49 R.F.L. (2d)
- <sup>102</sup> *Young v. Young* (1986) CanRepBC 566, 5 R.F.L. (3d) 337
- <sup>103</sup> See Endnote 78.
- <sup>104</sup> *McKenzie v. McKenzie* (2002) Court File Number 962.01
- <sup>105</sup> See Endnote 17.