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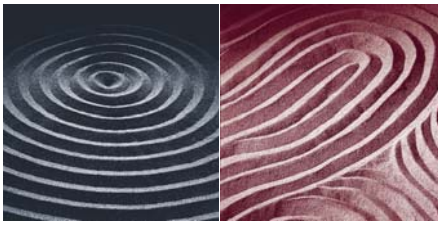

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Deducting Government Funded Programs from Damage Awards How Low Can We Go?

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A. INTRODUCTION

Canadians are fortunate to have a social system that provides some security to them should they suffer illness or disability. Government programs in a wide range of areas provide funding for those who need the assistance. These government programs help to spread the risk of liability for illness or injury throughout the population and as Canadians we are, for the most part, happy to assist in the management of that risk. The question is, how does this mesh with our tort system involving a victim who suffers injury as a result of the negligent act of another?

The broad question to be considered is to what extent should an injured plaintiff receive compensation for the same loss by more than one source? The Supreme Court of Canada has had several occasions to consider this important question and in each precedent-setting case, the Court was dramatically split on this issue.[1]

Full compensation for pecuniary loss seems a simple concept, however, it is influenced by the principles of deterrence on one hand and no windfall gains on the other. Given these two distinct positions, the issue of what should and should not be deducted from the calculation of damages is not as simple as it was.[2] With recent developments in jurisprudence, the concept has become increasingly more complex.[3]

The focus of this Paper will be a review of the underlying principles of tort law, the historical development of the rules for compensation, the introduction and adoption of the principle of double recovery, the current state of the law regarding collateral benefits and deductibility, trends in the law and the dangers associated with continuing down our current path.

B. THE COMPENSATORY PRINCIPLE

As a starting point, Canadian Courts have held that damages in tort are intended to put the injured person back in the same position they would have been prior to the injury, insofar as money can do so.

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[1] The decisions in *Ratych v. Bloomer* and *Cunningham v. Wheeler* were by a narrow majority. *Ratych* was 5:4 and *Cunningham* was 4:3.

[2] Ken Cooper-Stephenson, Personal Injury Damages in Canada, 1996 [Cooper-Stephenson]

[3] *Ratych v. Bloomer* [1990] 1 S.C.R. 940 [Ratych]

The compensatory principle requires that the tort victim be given full compensation for pecuniary loss and fair compensation for non-pecuniary loss.[4] The principle has two purposes or goals:

> First, to compensate a victim for any loss they have sustained as a result of the tort; and
>
> Second, to ensure that the recovery granted does not exceed the total value of the loss.[5]

The compensatory principle was first articulated in ***Livingston v. Rawyards Coal Company*** (1880) 5 APP. CAS. 25 at 39 (H.L.), where the House of Lords held:

> …in settling the sum of money to be given for reparation of damages you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

This proposition was cited with approval by Dickson J. (as he then was) in ***Andrews v. Grand & Toy*** (1978) 83 D.L.R. (3rd) 452 (S.C.C.) and further refined to include the idea that money is the best method to return the injured plaintiff to the original position. The principle of full compensation for pecuniary loss was endorsed by the Supreme Court of Canada in the trilogy of cases. When reviewing the decisions from the late 19th Century up to the Canadian trilogy of cases in 1978, there was clearly a preference for the Courts to err on the side of full compensation for the plaintiff's loss.[6] Cases such as ***Bradburn v. Great Western Rail Company*** [1874 to 80] All E.R. 195 (Ex. DIV), ***Parry v. Cleaver*** [1969] 1 All E.R. 555 (H.L.), ***Boarelli v. Flanagan*** (1973) 36 D.L.R. (3rd) 4 (Ont. CA) and ***Canadian Pacific Railway Ltd. v. Gill*** (1973) S.C.R. 654 all held that payments made to the plaintiff by outside sources such as private insurance, Canada Pension Plan payment and pension payments provided by an employer, were not deductible from the loss of income claim advanced by the plaintiff as against the tortfeasor.

From 1978 until 1990, the compensatory principle remained essentially the same. It was in 1990 with the decision in ***Ratych v. Bloomer*** [1990] 1 S.C.R. 940, where there was a significant shift in the interpretation of full compensation.

C. THE RULE AGAINST DOUBLE RECOVERY IN LOSS OF EARNINGS CLAIMS

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[4] *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 462 (S.C.C.)

[5] The compensatory principle focuses on the plaintiff, what they have lost and how much they should recoup.

[6] *Andrews v. Grand & Toy*, *Arnold v. Teno* and *Thornton v. Prince George School District No. 57*

Prior to ***Ratych v. Bloomer***, the Courts had consistently held that there should be no deduction for the plaintiff receiving the proceeds of private insurance. The Courts found it repugnant to allow the tortfeasor to benefit from the plaintiff's good management and foresight or from the generosity of a third party. Non-deductible items included social assistance benefits, proceeds from private insurance plans, proceeds from public benevolence, unemployment insurance benefits, employment benefits, voluntary payments and private pensions.

Then came the decision in ***Ratych v. Bloomer***, supra wherein McLaughlin J. (as she then was) stated that the plaintiff should not be granted an award which would exceed the total value of the loss to the plaintiff and the plaintiff should not be compensated more than once for their loss, thus enunciating the "double recovery principle". The plaintiff should only receive what he has lost.

1. *Ratych v. Bloomer*

The case involved Donald Ratych, a police officer with the Peel Regional Police Force who was injured in a car accident. He was off work for approximately three months due to his injuries. The collective agreement, of which he was a member, allowed for payments by his employer during the time he was off work due to injury. Mr. Ratych commenced an action for loss of income against the tortfeasor. The issue was whether sick leave benefits provided to Mr. Ratych under a collective agreement should be deducted from damages for loss of income. McLaughlin J., writing for the narrow majority, held that:

> Where the Court is dealing with deductibility of wage benefits equal to the plaintiff's salary, then the plaintiff should not be entitled to recover damages on that account.

McLaughlin J. acknowledged the rule in ***Bradburn v. Great Western Rail Company***, providing that benefits awarded under a private insurance contract should not be deducted from damages awarded against a tortfeasor. However, in this instance, she found that the benefits paid were not analogous to private insurance benefits as there had been no sacrifice by the plaintiff - nothing given. She stated that a plaintiff will be required to prove their loss including the fact that something was sacrificed to obtain the collateral benefit in order to forego the deduction of wage replacement benefits in the award of damages for loss of earnings. She stated that exceptions to this rule would include a subrogated claim advanced by the company providing the benefit or where there is a moral obligation to repay the third party for the collateral benefit provided.

McLaughlin J. explained that her decision was in line with the modern trend in tort law away from a punitive approach which emphasizes the wrong the tortfeasor has committed:

> A moments inattention is all that is required to trigger astronomical damages. The risks inherent in such activities as the use of our highways by motorists are increasingly recognized as a general social burden…the law of tort is intended to restore the injured person to the position he enjoyed prior to the injury, rather than to punish the tortfeasor whose only wrong may have been a moment of inadvertence.[7]

By providing so specific an example, one must wonder whether Madam Justice McLaughlin contemplated the application of the double recovery principle to more complex tort claims such as medical malpractice or sexual assault where a moment's inattention is not the case.

It is important to note that McLaughlin J. clearly states that her comments in ***Ratych v. Bloomer, supra*** should not be taken as extending to types of collateral benefits other than those affecting the loss of earning claim.

Cory J. (dissenting) found that sick leave benefits are part of an employment package and are negotiated during the collective bargaining process. These benefits are arrived at from the give and take of negotiation. He opined that it is unfair to require that a plaintiff employee prove that he has given something up as a prerequisite to non-deductibility. There is no reason that benefits obtained via a collective agreement should become deductible simply because they are bargained for in a collective agreement on behalf of the employee. In fact it may be impossible for the plaintiff to prove what he gave up in order to receive the benefit as the employee is not directly involved in the bargaining process. Cory J. determined that such benefits should not be deducted from the award of damages.

2. ***Cunningham v. Wheeler***

The Cory J. dissent foreshadows the decision in ***Cunningham v. Wheeler*** [1994] 1 S.C.R. 359 where he wrote for the majority and McLaughlin J. dissented in part. This case was heard as part of a group of three appeals on the issue of deductibility of collateral benefits. In this case, the employer paid disability benefits to the plaintiff. The plaintiff had not paid the premiums himself and the employer had no right of subrogation. The disability benefits were agreed to as part of negotiations for a collective agreement.

Cory J., writing for a narrow majority, accepted that the starting point in dealing with collateral benefits is no double recovery. An exception exists where the plaintiff has private insurance that was paid for by the plaintiff with foresight and sacrifice. He found that disability benefits that arise out of a collective agreement are included in the private insurance exception to the no double recovery rule. In a

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[7] *Ratych* at pp 47

union environment, there must be evidence that the plaintiff gave up something to acquire the benefit for the disability insurance to fall into the private insurance exception. Cory J. construed the insurance exception broadly as any benefits that existed as a result of the sacrifice of the plaintiff, any sacrifice, even a small one, will not be deducted from an award of damages.

Cunningham v. Wheeler was a small retreat from the landmark finding in ***Ratych v. Bloomer***, however, the effect of ***Ratych v. Bloomer*** on tort damages cannot be understated. Unless the plaintiff could prove that there was an obligation by way of subrogated claim to reimburse the payments made or that some, even small, sacrifice had been made to receive those benefits, the principle of double recovery forced a reduction in the damages awarded for loss of earnings.

McLaughlin J. (dissenting in part) would have deducted the disability benefits paid as no insurer had claimed the right of subrogation and she was not satisfied that sufficient sacrifice had been made toward the payment of the insurance benefit. She did go on to state that charitable gifts provided to the plaintiff would not be considered deductible from any loss of earnings claim.

3. ***B.M. v. B.C.***

Initially, after the dust had settled from ***Ratych v. Bloomer*** and ***Cunningham v. Wheeler***, it was believed that government-funded programs such as social assistance payments would be considered non-deductible as had been earlier held in the ***Boarelli v. Flanagan*** case. However, two recent Supreme Court of Canada cases would suggest that the Courts are prepared to move further to ensure that the plaintiff does not receive more than the total of the loss.

B.M. v. B.C. [2003] 2 S.C.R. 477 is a case of sexual assault by a foster parent. While the main issue in this case was the liability of the provincial government for the tortious act of a foster parent, a sub-issue involved whether social assistance payments made to the plaintiff were a form of wage replacement and, if so, whether they should be deducted from the damage awards for loss of earnings to avoid double recovery by the plaintiff. The Court focussed on the social assistance benefits that had been previously paid to the plaintiff assuming the plaintiff would not qualify in the future once a damage award was received. The Supreme Court of Canada found that the social assistance benefits paid in the past were a form of wage replacement as the payments replace that part of a person's income that would normally be spent on necessities. The Court held that social assistance benefits do not fit within the charitable benefits exception to the double recovery rule and the Court was not prepared to carve out a new exception that would allow for non-deductibility of social assistance payments. Given social assistance benefits come out of public funds, and given that taxpayers contribute to these funds in the belief that they will be used for legitimate purposes such as relieving genuine need, the Court determined

that it was unfair to taxpayers to allow certain plaintiffs to recover these funds and then receive a duplicative payment from the tort award.

4. *L(H) v. Canada*

In ***L(H) v. Canada*** [2005] S.C.C. 25 involving another case of sexual assault, the Court followed ***B.M. v. B.C.*** and deducted the past social assistance payments from the past wage loss claim.

5. The Alberta Experience

In Alberta, there are two interesting decisions to highlight with respect to the deductibility of wage replacement benefits:

(a) *O'Connor v. Mahabir* [1981] 243 A.R. 11 (Q.B.).

In O'Connor, the plaintiff was struck by a C-train and sought damages for the negligence of the defendant. The plaintiff was receiving Assured Income for the Severely Handicapped (AISH) payments and the defendant argued that those payments should be deducted from the award. The plaintiff argued that there are two recognized exceptions to the prohibition against double recovery, first, the right of the Director of AISH to recoup the amount and second, the uncertainty around the future funding of the program. The Court held that double recovery in this case should be avoided stating that the less certain the Court is that a collateral benefit will in fact flow to the plaintiff, the less inclined the Court should be to make the deduction. If the Court is uncertain about whether the plaintiff will be eligible for the benefit or where the benefit program or the level of coverage of the program is uncertain, the Court may refuse to deduct the benefit. Where the Court is satisfied the benefits will continue to flow to the plaintiff in the future, then their value will be deducted. In the end, the Court refused to deduct the benefits due to the Director's right of recovery, the uncertainty of the continuation of the program and the discretionary nature of the payments.

(b) *M.Y. v. Boutros* [2002] 2 Alta LR (4th) 153 (Q.B.)

In this case the plaintiff was the mother of a child born after she underwent a tubal ligation. It was a medical malpractice claim wherein the mother was claiming that her pregnancy was due to the negligent manner in which the doctor performed the tubal ligation. The claim for damages was for the additional costs that the family would incur in having to meet the needs of the child. Madam Justice Rawlins was advised of the government benefits that would be available to the family including the Canada Child Tax Credit as a result of the birth of this child. The defendant asked that the Court take into account the payments that would be available through government-funded programs. Madam Justice Rawlins reviewed the O'Connor decision as well as ***Ratych v. Bloomer***. She held that in the case at bar,

there was no evidence presented by the plaintiffs to show that the government benefits may be eliminated in the future or that the eligibility requirements might change such that the family would no longer be eligible. She held that the government benefits should be taken into account in assessing the incremental cost to the family of raising the child. She considered the lengthy history of the benefits paid and determined that there was a strong likelihood that they would continue in the future. These benefits were triggered by income level and the number of children, they were not considered discretionary like AISH benefits.

After weighing all of the potential increases and decreases in the benefits that may be payable to the family, Madam Justice Rawlins further declined to award any contingency for the possible future elimination (or improvement) of the benefits.

D. DEDUCTIONS FROM THE AWARD FOR COST OF CARE

Not only have inroads been made with respect to the loss of earning capacity claim by allowing deductions for certain benefits paid to the plaintiff by other sources, there appears to be a movement afoot to consider the deduction of government-funded programs in the cost of care award.

1. *Krangle v. Brisco*

The trend begins in 2002 with the Supreme Court of Canada's decision in ***Krangle (Guardian ad litem of) v. Brisco*** [2002] 1 S.C.R. 205. Mervyn Krangle was a baby born with Down Syndrome, a condition that is identifiable by genetic testing during pregnancy. The doctor supervising Mrs. Krangle during her pregnancy failed to inform her or advise her of the availability of genetic testing. Mrs. Krangle stated that had she known she was carrying a child with Down Syndrome, she would have chosen to abort the pregnancy. The baby was born and the parents brought an action against the doctor. This was not a claim advanced by Mervyn Krangle himself but by the parents for the additional cost that they would incur in raising a Down Syndrome child over those of a child without such health concerns.

The trial judge awarded damages for the additional cost of raising the child to the age of 19 years. At 19 years, the trial judge held that the best care for Mervyn would be in a group home setting and that the group home would be government funded. The cost of group home care for Mervyn after the age of 19 years was not included in the award to the parents. The judge did award a small contingency of 5% of

the total anticipated cost to the parents for the chance that the government-funded group home care would not be available in the future.[8]

Shortly after the trial, the British Columbia Provincial Government amended the ***Family Relations Act***. These amendments made the parents of children under the *Act* responsible for their care. In light of these amendments, the parents of Mervyn Krangle appealed to the B.C. Court of Appeal and argued that these amendments made them liable for the cost of raising their child and that there was the potential that the government would have a claim against them for the cost of the group home. They asked that the damages award be increased to account for this new possibility. The British Columbia Court of Appeal agreed and allowed the appeal referring the matter back to the trial judge for the calculation of the cost of future care.

Leave to appeal to the Supreme Court of Canada was sought and obtained. The issue before the Supreme Court was whether the Krangles were entitled to damages for the cost of caring for Mervyn after he reaches adulthood. The Supreme Court of Canada held that the Krangles were not entitled to damages for cost of care after Mervyn reached adulthood and that the possibility of loss to them on that account was adequately reflected in the contingency award made by the trial judge. McLaughlin C. J. stated:

> To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.[9]

This case is unusual in that the claimant is not the one requiring care, however, McLaughlin C. J. stated there was no difference in how the principles would be applied:

> The Krangles are entitled to be reimbursed for losses they may reasonably be expected to incur on the basis of the evidence and the law, plus an award for any contingency that the projections may not be realized.[10]

Group homes in British Columbia at the time were paid for by the government as long as the adult did not have assets over $100,000.00. The monthly cost of the group home was $654.00 and it was to be paid by the government as long as the criteria were satisfied. McLaughlin C. J. agreed with the finding of the trial judge that the government funding was not going to be decreased for adults requiring group home care and thus concluded that the Krangles were not going to be required to pay for the cost of Mervyn's group home. Further, McLaughlin C. J. was of the opinion that in light of the new changes to

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[8] *Krangle* at pg 209
[9] *Krangle* at pg 216
[10] *Krangle* at pg 217

the ***Family Relations Act***, Mervyn would not be caught by the definition of "child" and therefore the Act requiring adults to provide for their "children", would not apply to the Krangles after Mervyn reached adulthood.[11] Given that the state will pay for Mervyn and that there is little chance that he will not qualify for the benefits available due to his disability, McLaughlin C.J. concluded that the trial judge was correct in refusing to award the value of the group home to the Krangles.

2. ***Phillip v. Whitecourt General Hospital***

We then come to the Alberta decision of ***Phillip v. Whitecourt General Hospital*** [2004] 25 Alta. L.R. (4th) 21 (currently under appeal). The decision of Montana Phillip is complex both with respect to the issues of liability and quantum. The comments herein reflect only the decision of the trial judge, Watson J., regarding damages.

Montana Phillip was born prematurely. Justice Watson determined that Montana had several health problems including vision impairment and other congenital illnesses at the time of birth. In the first few days of her life, she developed jaundice and her parents took her to the Whitecourt General Hospital. They felt that she was not feeding properly. Dr. Bablitz examined Montana and sent her home with her parents. The next day she had a severe hypoglycaemic episode. She was blue and her blood glucose levels were extremely low.

Dr. Bablitz was found to be negligent in his treatment, or lack thereof, of Montana. However, due to Montana's already existing significant health problems, Dr. Bablitz's negligence was not the only cause of Montana's developmental delays. As such, Watson J. had to discern what damage was the result of the negligence and what costs would have been incurred in her "original" position in any event. In other words, what damages can be associated with the change in Montana's condition as a result of the negligence of Dr. Bablitz, assuming that her "original" position was that of a "mildly retarded blind child".[12]

By the time the matter proceeded to trial before Watson J., Montana was 10 years old and with the help of government-funded programs, was able to attend school. Watson J. reviewed the claim for damages pre- and post-trial. There was evidence that Montana was receiving time with a teacher's aide

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[11] *Krangle* at pg 221-222. The definition of "child" under the British Columbia Family Relations Act is "includes a person who is 19 years of age or older and, in relation to the parent of the person, is unable, because of illness, disability or other cause, to withdraw from their charge of to obtain the necessaries of life". McLaughlin C.J. argues that because Mervyn will leave his parents house and go to live in a group home that he will have left his parents charge and therefore he is not a "child" under the Act and thus his parents are not responsible for his care.

[12] *Phillips* at pp 542

both in and out of school hours and that up to the trial these hours were funded by the school board. Watson J. divided his analysis regarding these hours by referring to the funding already provided to Montana and the amount of funding she would require until the age of 18. Regarding the deductibility of benefits paid through the school system, Watson J. chose to deduct from Montana's damage award for cost of care the amount of "school-funded" assistance that she had received from a publicly-funded teacher's aide from the time that she entered the school system up to the last day of trial. His reasons for deducting the value of these services were twofold. First, that she would have required these services in her "original" position in any event and second, to avoid double recovery.[13]

With respect to the school support that may be provided to Montana from the last day of trial to the age of 18, Watson J. held that such school support would not be deducted from a cost of care award to Montana. Watson J. stated that there was sufficient evidence at trial to allow for the possibility that the school board would seek to recover funds that they spend on Montana in the future, from her estate. He stated:

> The ability of the school system to seek some sort of recovery from Montana's estate arising from this lawsuit cannot be sufficiently excluded from my mind. The legislature of Alberta may at any time elect to pass a statutory right to recover overpayments in relation to money advanced to any residents of Alberta.[14]

Further, Watson J. stated that:

> Although this is a hypothetical, it seems to me that the risk of hypothetical problems should rest upon the tortfeasor, not the victim.[15]

Regarding Montana's care after the age of 18 and up to 45, Watson J. found that Montana would likely participate in government-funded programs. Despite this, he awarded Montana the costs associated with a "visitor/nanny/escort" for 40 hours a week taking into consideration that after age 18, she would no longer be in school for the day and would require extra supervision at home.[16] Watson J. did not deduct any funds from this calculation and the 40 hours per week of care were to extend from age 18 until age 45, at which time a different care facility was thought appropriate.

After the age of 45, and until the age of 65, it was felt that Montana would live in a group home. Watson J. awarded the cost associated with the group home and refused to deduct any portion that might

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[13] *Phillips* at pp 550, 552

[14] *Phillips* at pp 555.

[15] *Phillips* at pp 555 and 556

[16] *Phillips* at pp 571

be paid by the government in the calculation of these damages. Although he took notice of the possibility of double recovery, he further concluded that:

> all of the risks associated with double compensation in this respect are outweighed by the risk of less than adequate compensation for Montana overall.[17]

E. FAMILY SUPPORT FOR CHILDREN WITH DISABILITIES ACT

The parties should be aware of legislation in place in Alberta proclaimed August 1, 2004. The legislation provides for various kinds of funding to the families of children suffering a variety of disabilities. Disabilities as defined in the Act includes chronic developmental, physical, sensory, mental or neurological condition or impairment but does not include a condition for which the primary need is for medical care or health services to treat or manage the condition unless it is a chronic condition, that significantly limits a child's ability to function in normal daily living.

The parents of the disabled child will enter into an annual agreement with the Minister of Children's Services for the needs of their child. Examples of services include: travel expenses, counselling, sibling care, respite, developmental aide, behavioural aide, health costs and other specialized services. The agreement entered into is set out as Form 1 "Family Support for Children with Disabilities Agreement". Of note are clauses 3(1), 2 and 3 which will affect the position of the parents of a disabled child in any litigation involving that child (see attached to this paper a copy of the legislation, regulations and Form 1).

F. TRENDS REGARDING DEDUCTIBILITY OF GOVERNMENT-FUNDED PROGRAMS

From the above historical analysis, it is clear that the law regarding deductibility of government-funded programs in relation to damage awards for loss of earnings and cost of care is evolving. Historically, damage awards erred on the side of full compensation and away from the idea of deductibility. However, over the last 16 years, the law has, and continues to be, shifting towards a greater emphasis on deductibility. In the earlier cases of ***Andrews v. Grand & Toy***, ***Parry v. Cleaver***, the idea of deducting potentially unknown benefits from an award of damages was unacceptable. However, after ***Ratych v. Bloomer***, that position has changed. In ***Krangle v. Brisco***, McLaughlin C. J. clearly stated that

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[17] *Phillips* at pp 580

the services that are currently paid by the government would be deducted from an award of damages to the injured plaintiff or a third party. Deductions for publicly-funded services, at least retrospectively, were also made by Watson J. in ***Phillips v. Whitecourt General Hospital***. This shift in the law is of concern, as the potential for under-compensation of injured plaintiffs becomes a real possibility.

The broader issue raised by the decisions of the last five years is to what extent the injured plaintiff will be required to rely on publicly funded, sometimes discretionary, services for their future income or care. Further, who should bear the risk of the potential decline in publicly funded services and is the injured plaintiff only entitled to the services provided by the government, or are they entitled to more than the minimum? In trying to come to a conclusion regarding these issues, it is helpful to explore the arguments in favour of deduction of publicly funded services, the arguments against deduction and the associated policy implications of both positions.

For clarity, the term "publicly funded services" in this portion of the paper includes disability grants for education, state subsidized care and other sources of funding provided by the Government at the taxpayers' expense and that an injured plaintiff may be able to apply for and receive. For the purposes of the following discussion, the definition of "publicly funded services" will not include "wage replacement". From the foregoing review of the law, it would appear that the courts are clearly disposed to deducting other sources of income that may be available to the plaintiff from loss of earning capacity award. The exceptions have been relatively clearly enunciated by the Supreme Court of Canada and have been followed by a number of subsequent cases. The Supreme Court of Canada has now stated in two recent decisions that social assistance payments made in the past should also be deducted from any wage loss claim.

We are just seeing the start of some discussion with respect to the deductibility of government funded programs in the cost of care award. ***Krangle v. Brisco*** can be distinguished on its facts as the damages were to go to the parents rather than the injured person and ***Phillip v. Whitecourt General Hospital*** is a trial decision currently under appeal. The question then is, where should the law go with respect to deductibility and what policy considerations should be taken into account? It should be noted that the charitable benefits exception to the double recovery rule remains unchanged, meaning that any source of funding that accrues due to benevolence or as the result of a gift from a third party or from a registered charitable organization is not to be deducted.

G. POLICY CONSIDERATIONS

1. **Argument Supporting Deduction**

Arguments supporting the deduction of publicly funded services from the cost of future care award include:

- Deduction complies with the compensatory principle in that only the plaintiff's outstanding monetary needs are included in the calculation;
- The defendant has contributed to the pool of public funds and having sacrificed those funds for the public good should be able to see some benefit;
- In some cases the benefits are available with some significant certainty with no discretion in the provision of payment;
- Tort law is primarily intended to provide compensation and deterrence will come from alternative systems.

2. **Arguments Against Deduction**

Arguments against deducting publicly funded services from the cost of care award include:

- Publicly funded social services are in place at the will of the current government that is in power – unlike the purchase of disability insurance which is in the control of the plaintiff, publicly funded services are outside the plaintiff's control.
- Government funded services are subject to budget constraints and changes in cash flow and funding fluctuates depending on needs and priorities.
- Funding levels and commitments are not consistent between the provinces.
- Some funding is affected by the income level or assets held by the plaintiff.
- The plaintiff assumes all of the risk that the funding or service provided may not be adequate, could be taken away or decreased in the future, or that circumstances may change such that the funding is denied.
- The plaintiff will be burdened with the processes and activities associated with applying for and qualifying for the funding and will be reduced to accepting whatever services are

available as opposed to choosing the services and practitioners that are most appropriate for them.

- A component of tort law is to ensure there is some deterrence to discourage similar conduct by the general population.

- Given that the damage awards in tort claims are decided at the time of trial, there is no opportunity for re-assessment later based on changing personal or social conditions.

H. CONTINGENCY FACTOR

Given the foregoing, it is our position that with respect to the deduction of government funded programs in awarding cost of care to an injured plaintiff, the benefit of fair compensation to the victim outweighs the risk of potential double recovery. Certainly Watson J. in ***Phillip v. Whitecourt General Hospital*** commented that in terms of long term future funding for a disabled plaintiff, the risk of double recovery is outweighed by the risk of less than adequate compensation overall. Despite this, it is recognized that the law has shifted toward the idea of no windfall gains and has determined to accomplish this by the deduction of collateral benefits.

At the very least, the assessment of the value to be deducted with respect to publicly funded social services should be balanced by a reasonable and ample contingency percentage to cover the future risk that the service will either not be provided or that the plaintiff will not qualify to receive it. Contingency percentages are often difficult to assign and can be random in some respects. In ***Krangle v. Brisco***, a contingency of 5% of the total cost of a group home was assigned for the possibility that the government of British Columbia would not provide group home funding to Mervyn in the future. In a B.C. Supreme Court case, ***Zhang v. Kan***[18], the judge awarded a 30% contingency that the government services would not cover the needs of the plaintiff.

Conversely, in cases of social assistance as wage replacement, judges have deducted the full amount of the benefit, without contingency, as they found the benefits to be completely non-discretionary.

Failure to provide a reasonable contingency percentage when deducting the value of publicly funded services results in the plaintiff taking the risk that the services will not be adequate to meet their

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[18] *Zhang v. Khan* 2003 BCSC 5

needs in the future, effectively allowing the tortfeasor to escape liability entirely for the portion of the plaintiff's injuries that may not be covered by a publicly funded benefit.

I. BURDEN OF PROOF

The question then becomes who should bear the onus of proving the existence of the public service to be deducted from the award of damages?

Clearly it is for the plaintiff to prove their loss in totality. The question then becomes is it up to the plaintiff to prove that they will not qualify for publicly funded benefits or for the defendant to prove that they will? In Ontario, legislation has changed the common law rules regarding deduction, the onus is placed on the defendant to prove not only the available services and sources of funding but also that the plaintiff will qualify and will continue to receive them.[19] Akin to other defences available to the tortfeasor in any claim for damages by the plaintiff, it should remain upon the tortfeasor to prove the deductions that should be accepted by the courts.

The idea of a reverse onus is a reasonable way to balance the risk associated with the deduction for the plaintiff.[20] The plaintiff would then prove their loss without the burden to educate the court as to all of the possible sources of government funding that may or may not be available. If the defendant wants to have the benefit of a deduction, then the onus rightly falls on the defendant to prove not only the type of services available but also that the plaintiff will now qualify for and will continue to qualify for the benefit. Even then, arguably the court should still assign a contingency for the chance that the benefit will not be available in the future and the possibility that the plaintiff will not have that funding available to them.

J. CONCLUSION

It is clear that the law has shifted toward avoidance of double recovery and, consequently, the increasing use of deductions from the total award as a tool to this end. The impact of including publicly funded benefits in the list of deductions has the result of putting undue and undeserved risk on the already

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[19] Hillel David, *Judicial Treatment of Statutory Limitation of Collateral Benefits: The Trilogy*; Advocates Quarterly Vol 21, Nov 1998 pg 32-37

[20] Hillel David, *Judicial Treatment of Statutory Limitation of Collateral Benefits: The Trilogy*; Advocates Quarterly Vol 21, Nov 1998 pg 32-37

injured plaintiff. Deduction of publicly funded benefits has the result of reducing the damages for which the tortfeasor is liable and as such provides a benefit to them. The Court should not continue to expand the list of deducted items to include uncertain and often discretionary public services. However, if the law continues to move in this direction, then the tortfeasor and not the plaintiff, should bear the burden of proving what benefits are available.