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WHO SHOULD BEAR THE RISK? AWARDS OF FUTURE CARE COSTS IN LIGHT OF UNCERTAIN GOVERNMENT FUNDING

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Awards of tort damages are based on an enticingly simple principle of just compensation, summarized by McLachlin J. (as she then was) in *Ratych v. Bloomer* as follows:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been in had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. *It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle.*[1] [emphasis added]

However, in many situations, a strict application of this principle may be easier said than done. Quantification of pecuniary damages is closer to an art than a science, especially when it comes to awards for loss of future income or cost of future care. Traditionally, in calculating cost of future care, courts have not taken into account plaintiffs' compensation for the same injuries from private "collateral sources", such as private disability insurance. As was explained by Baron Pigot in the classic case of *Bradburn v. Great Western Ry. Co.*, a payout from an insurance policy is not *caused* by the accident, but is merely predicated upon it:

> The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. *He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.*[2] [emphasis added]

Whereas the policy choices in respect of private insurance may appear straightforward, courts were faced with a problematic and troublesome dilemma when dealing with government-funded benefits provided to a plaintiff free of charge. The private-insurance contract rationale was no longer applicable—neither the plaintiff nor the tortfeasor has a contract, apart from a social one, with a government that pays for the services. Faced with this dilemma, and perhaps reflecting different socio-economic realities, courts in different provinces found different solutions to the problem. In British Columbia, enthralled with the optimism of the Canadian welfare state of the late 1970s and early '80s, the Court of Appeal held that forcing a defendant to bear costs of care for which the defendant was

not and would not be required to contribute would be a form of double compensation. In Ontario, the Court of Appeal found no difference in principle between private and public insurance as the government could recoup the costs of providing the services by legislating a right of subrogation. In yet another approach, one ultimately accepted across Canada, courts in Manitoba and Alberta held that neither government programs themselves, nor plaintiffs' continuing eligibility for their services, were certain, and thus allowed that such a deduction would go against the principle of guaranteeing compensation to a plaintiff for the rest of his or her life.

In this article, the authors examine the evolution of the applicable legal principles in the four provinces mentioned above, and provide as well an overview of the latest precedents on this subject.

BRITISH COLUMBIA

B.C. authorities mandating deduction of government-funded services from cost of future care awards effectively begin in 1983 with *Wipfli v. Britten*.[3] *Wipfli* involved a severely disabled plaintiff whose full-time care was paid for by the province. At trial, defendants argued that value of the government-funded care services should be deducted from the cost of future care award in order to avoid double recovery. Balancing the general principle that a disabled plaintiff must be fully compensated in all foreseeable and even "rather improbable"[4] circumstances against the "contingency that the...plaintiff may have to reimburse [the hospital] for the amount which may be deducted by the minister from payments to be made to the institution for his care", Hinds J. did not allow the deduction.[5]

On appeal, Taggart J.A., writing for the majority, opined on "whether a claimant for damages should recover from a tortfeasor for a loss which has been met by private or public benevolence *at no cost to the claimant*"[6] (emphasis in original). Ultimately, after analyzing the statute under which the services were provided and distinguishing all of the plaintiff's authorities, Taggart J.A. held that the value of the provided services was not a compensable pecuniary loss:

> [Damages for personal injuries] may be of a pecuniary nature caused by expenditures incurred in the past or to be incurred in the future for medical, hospital and similar expenses. I should add that I do not include in the latter category gratuitous services rendered by relatives of the injured person. *If no payment has been made for such expenses and there is no likelihood of payment being required in the future, there has been no loss of a pecuniary nature for which damages should be awarded.*[7] [emphasis added]

Unlike Hinds J., Taggart J.A. had no reservation about the future:

> [W]e have a *claimant...who has never contributed in the past, and is highly unlikely to contribute in the future, to the fund which protects him from loss.* The Act requires the provision of hospital care and services free of cost to the beneficiary at specified levels of care. It is a *universal plan* covering all beneficiaries or qualified persons of whom Joseph is one...
>
> I remain unconvinced that they have application to the case of a claimant protected by a universal hospital plan for which he has paid nothing in the past and is *unlikely to be called on to pay anything in the future.*[8] [emphasis added]

Given his views on the universality of the government-provided services, Taggart J.A. easily rejected the plaintiff's concerns that allowing the deduction would

be tantamount to allowing the tortfeasor to benefit from the government services provided to the plaintiff:

> I think it inappropriate to say the tortfeasor should not benefit from the establishment of a universal hospital insurance plan paid for out of the general revenues of the province supplemented by grants from the federal government. *It matters not how or why the personal injuries were received. The plan covers all residents of the province requiring hospital care and services.*[9] [emphasis added]

Until the middle of the 1990s, *Wipfli* was consistently followed in the B.C. Court of Appeal. In *Semenoff v. Kokan*, the court held that where a plaintiff is "under no legal obligation to pay the medical expenses, he has no right to recover them from the defendant".[10] In a similar vein, in *Hayre v. Walz*, the court applied *Wipfli* to hold that "[i]f it were clear that the...pain treatment...was available under the medical services plan in this province, on the authority of *Wipfli*...it would be my opinion that there should not have been an award to the plaintiff under that head".[11]

Despite these seemingly conclusive appellate court rulings, *Wipfli* was re-examined by Madam Justice Levine in *Jacobsen v. Nike Canada Ltd.*,[12] where the defendant again argued that the value of government-funded services should be deducted from the cost of future-care award. However, unlike the "universal plan" addressed in *Wipfli*, the particular government program at issue in *Jacobsen* was income-based, that is, the level of subsidy depended on the person's financial circumstances. In a markedly different approach, Levine J. did not accept the certainty of the program's existence or the plaintiff's continuing eligibility for its services:

> It is entirely conceivable today that the personal care services the plaintiff requires and for which subsidies are available based on income will not be subsidized, or if they are, at a much lesser level, in the future. It is common knowledge in the community, and *I take judicial notice of the fact that in 1996, 12 years after* Wipfli *was decided, the health care system in Canada is under significant financial pressure.* Governments at all levels are seeking ways to increase their revenues and reduce their costs. It is certainly conceivable that subsidized health care services such as those now available to the plaintiff will not be available in the future as they have been in the past.[13] [emphasis added]

Distinguishing *Wipfli*, Levine J. effectively restricted it to a very narrow situation:

> *I do not consider that the principles on which* Wipfli *and* Semenoff *were decided are generally applicable to all government subsidies for health care costs. In the absence of evidence that the subsidy provided for long term care is subject to the same legislative safeguards and universality as was the case with the medical and hospital costs at issue in those cases*, I am of the view the plaintiff would not be adequately compensated for the cost of his future care if the award were reduced because a subsidy may be available.[14] [emphasis added]

Within a few years, the *Jacobsen* restriction was followed in *Elder (Guardian ad litem of) v. Farrell*[15] and in *Brennan v. Singh*.[16] In *Elder*, Gill J. acknowledged *Wipfli* and *Semenoff*, but tacitly distinguished them based on *Jacobsen*:

> In *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (B.C. S.C.), *Wipfli* and *Semenoff* were not applied. In *Jacobsen*, Levine J. concluded that it was likely that Mr. Jacobsen would

be required to pay the costs of his future care. In contrast, the conclusion in *Wipfli* was that it was "inconceivable" that there would be a future modification in respect of the services in question. In *Semenoff*, the situation was comparable.

If Kyle were an adult, he would not now incur costs for adult residential care, at least for the present. But he is ten years of age and Mr. Douglas could not say what funding would be available in the future as funds are budgeted on a year by year basis. At present, there is no means test in respect of the provision of services, but again, whether that will be so in the future cannot be predicted. Therefore, the conclusion must be that Kyle is likely to be required to pay expenses associated with his care.[17]

In *Brennan*, similar reasoning was applied by Harvey J. to an "Assisted Devices Program" established by the B.C. government to subsidize costs of disability equipment:

[H]aving regard to the evidence before the court with respect to the ADP, particularly that there is no guarantee that it will continue to be in existence in the future, I consider *Wipfli*, relied upon by the defendants, is distinguishable. I do not consider that what I am to consider as the viability of the ADP is properly comparable to free hospital care and services in this province which the Court of Appeal in *Wipfli* considers it is inconceivable will ever be substantially modified.[18]

Despite *Jacobsen*, *Elder* and *Brennan*, it cannot be said that *Wipfli* has been distinguished or restricted out of existence. In fact, there are two potentially persuasive authorities that may support an argument otherwise. Most notably, in *Krangle (Guardian ad litem of) v. Brisco*,[19] the Supreme Court of Canada considered the parents' claim for cost of future care for their disabled infant plaintiff son. Specifically, the parents argued that they would have to provide care for the plaintiff for the rest of their lives, even after he would turn 19. The majority at the B.C. Court of Appeal were sympathetic to these arguments and affirmed the trial judge's reasons for distinguishing *Wipfli* as being inapplicable to the government program which may not be available to take care of the plaintiff after he turns 19:

The critical difference in the case at bar is that the BC Benefits scheme is not universal. It is means tested, available only to those who are not self supporting in accordance with the income and asset criteria established by the regulations. The BC Benefits scheme is complex but I think it *allows the government to* treat the parents' obligation under s. 88(1) of the *Family Relations Act* as the primary obligation and either *refuse BC Benefits assistance to Mervyn or, alternatively, claim indemnity from the parents under an assignment of Mervyn's s. 88(1) right to maintenance.* The plaintiffs are characterized financially by their counsel as upper middle class and it is unlikely that they would be able to resist an application under s. 88(1) on grounds of economic hardship.[20] [emphasis added]

However, McLachlin C.J.C. had a different view of the situation:

Moreover, the basis for the suggested moral obligation seems tenuous in these circumstances. *It is the policy of the Province of British Columbia to provide care for disabled adults. This policy is expressly stated in the* BC Benefits (Income Assistance) Act, *which confirms in the preamble that "British Columbians are committed to preserving a social safety net that is responsive to changing social and economic circumstances".* When a disabled person becomes an adult, the burden of his or her care shifts from the parents to society as a whole, and it is accepted as fair and just that the continued burden of care of disabled adults should be spread over society generally. At one time, it may well have been the moral responsibility of parents to care for a disabled child for as long as they lived. *But for some decades now, that moral responsibility has shifted to British Columbia society as a whole, as expressed by legislation enacted and preserved by successive governments. No evidence*

> *was presented for the proposition that it is shameful or wrong for parents to accept the benefits provided by the government which allow adult disabled children to be cared for under the social security network of the state.* Great as social and medical progress may be, disability will inevitably strike some members of society, randomly and irrationally. It is not immoral for a society to say that when this happens, the burden will not be confined to the individual and his family, but will be shared by society as a whole.[21] [emphasis added]

It is at least arguable that *Krangle* has a very narrow application, as the party claiming the cost of future care was not the plaintiff but rather his parents, who did not have a *legal obligation* to care for him. McLachlin C.J.C. explained that the parents' claimed obligations were purely *moral obligations*. Thus, it does not appear that the decision actually addressed either *Wiplfli* or its restriction in *Jacobsen*, *Elder* and *Brennan*.

In addition to *Krangle*, it is also useful to consider a dissenting judgment by Smith J.A. in *B. (M.) v. British Columbia*:

> Indeed, recovery of medical expenses paid by the provincial medical scheme is never sought by nor awarded to plaintiffs in tort actions. Similarly, *payment of hospitalization and rehabilitation expenses under the provincial hospitalization scheme offsets losses for cost of care, precluding an award of tort damages under that head*: *Wipfli*... cf. *Krangle (Guardian ad litem of) v. Brisco*...where, in affirming the trial judgment, McLachlin C.J.C., for the Court, described as unassailable on the evidence and in law the trial judge's conclusion that the plaintiffs would suffer no loss if their disabled son's group home care should be paid for by the government under the *GAIN Act* scheme, subject to a contingency that the state would change its policy of providing free care, for which he awarded damages (at paras. 28–29).[22] [emphasis added]

At the Supreme Court of Canada, McLachlin C.J.C., writing for the majority, upheld Smith J.A.'s reasoning in relation to income replacement programs. She did not, however, address the issue of future care costs.[23]

In conclusion, while there is some doubt as to whether the Supreme Court of Canada has agreed with the restriction of the *Wipfli* approach, the common practice in B.C. appears to favour the proposition that, due to the uncertainty of government funding, the value of government-funded services should not be deducted from a cost of future-care award.

ONTARIO

The Ontario saga begins with the often-cited decision in *Boarelli v. Flannigan*, where Dubin J.A. of the Ontario Court of Appeal undertook a comprehensive review of British and Canadian authorities and concluded that there was no difference in principle between social welfare programs and private insurance policies:

> *I do not think that there is any difference in principle between benefits received under our present social welfare legislation and those received by way of private or public benevolence.* In such case it may be said that the injured party has received a reward as a result of the injury. If that is so, in my view, it is no concern of the defendant and such matters should be dealt with by the appropriate legislative authority. In many statutes a right of subrogation for moneys received from an unsuccessful defendant is established. In this way the loss is borne by the tortfeasor and the question of overlapping compensation is thereby avoided. However, in my opinion, it is for the appropriate legislative authority to determine whether the right of subrogation should be included in those statutes which are now silent in this respect.[24] [emphasis added]

The *Boarelli* approach appeared to be almost universally broad, summarized by McLachlin J. (as she then was) in *Ratych* as applying to "welfare payments, moneys from private or public benevolence, unemployment insurance benefits, private insurance moneys, employment insurance benefits pursuant to collective bargaining agreements or private contracts of employment, *ex gratis* payments nor pensions".[25] However, despite this apparent breadth, Ontario courts, at least until the unanimous Court of Appeal decision in *Stein v. Sandwich West (Township)*,[26] appeared to restrict *Boarelli* to lost wages and not to cost of future care.

The first Ontario case which expressly dealt with the issue of awards of cost of future care for government-funded services appears to be *Stein* (Gen. Div.), where Zuber J., without citing *Boarelli*, refused to allow a deduction due to "the uncertain expectation of government help":

> In the past some of the care and some of the equipment provided to John has been wholly or partly funded by government, that is the government of Ontario. It was, however, the evidence of Carol Kelly of Designable Environment and of Jane Staub, whose evidence I accept, that *these programs of government assistance really can not be counted on to endure. It seems to me to be obvious that John Stein's award for future care should not be diminished based upon the uncertain expectation of government help*. It appears that the alternative pools of funds of which McLaughlin, J. spoke in *Ratych v. Bloomer*, are drying up.[27] [citation omitted, emphasis added]

Perhaps reflecting the fact that the only authority cited in support of the "obvious" conclusion did not actually deal with the issue of costs of future care,[28] only a year later, Zuber J. appeared to change course and allowed a partial deduction in *Dube (Litigation Guardian of) v. Penlon Ltd.*,[29] again without citing *Boarelli*. However, despite this change, a unanimous Court of Appeal affirmed *Stein* in 1995:

> The Canadian taxpayer pays for publicly funded medical and health care services. If OHIP had claimed subrogation, it would, by statute, be entitled to reimbursement for its expenses. There being no claim for subrogation, the respondents are entitled to receive full and fair compensation. *In our view, full recovery in the present case, of past and future health services, does not involve double recovery*. We adopt the respondents' argument in that respect:...
>
> (b) On the evidence of the expert witnesses for both sides, the continuation of publicly funded programs of this nature at adequate levels of care is not assured and is most uncertain...
>
> In our view, to allow the deduction claimed by the appellants would have the effect of transferring to the appellants the benefit conferred by statute on the respondent John Stein, Jr., and similarly transfer to the appellants the benefit of OHIP's waiver of its subrogation rights.[30] [emphasis added]

In an unusual application of *stare decisis*, Lacourcière J.A. cited *Boarelli*, but only as summarized by McLachlin J. in *Ratych*.[31] Although the cited summary commented solely on the breadth of the *Boarelli* decision, it appears that Lacourcière J.A. implicitly relied on the subrogation principles set out in *Boarelli* but not expressly considered in *Ratych*:

> *Boarelli*...a decision of this court dealing with the issue of the deductibility of collateral benefits, adopted a broad approach to non-deductibility summarized by McLachlin J. in *Ratych v. Bloomer*...
>
> The Canadian taxpayer pays for publicly funded medical and health care services. *If OHIP had claimed subrogation, it would, by statute, be entitled to reimbursement for its expenses. There being*

no claim for subrogation, the respondents are entitled to receive full and fair compensation. In our view, full recovery in the present case, of past and future health services, does not involve double recovery.[32] [emphasis added]

The subsequent cases have consistently, albeit not unanimously, adopted the *Stein* principle and disallowed deductions in view of uncertainty of government programs and plaintiffs' continuing eligibility. Thus, in *Dann (Litigation Guardian of) v. Chiavaro*, Molloy J. held:

It is by no means certain that the ADP will continue at current levels of funding in these days of increasing government cutbacks and it is even more unlikely that the assistance will continue to be provided without any means testing. Accordingly, even if the plaintiff's overall estimates under this category are slightly on the high side, I am allowing the full amount so as to provide a contingency for changes to levels of funding in the future.[33] [emphasis added]

Similarly, in *MacLean v. Wallace*, Dilks J. stated:

It seems to me that if anyone should be forced to run the risks attendant on government funding it should not be the innocent party. Funding under the Assistive Devices Programme is not mandatory; it depends upon the political and social conscience of the government of the day. *In days of increasing cutbacks to social spending continuation of existing funding is by no means certain.* If the defendants' argument were to prevail and if funding were to be reduced or discontinued all together, it would mean that an innocent party might find himself shouldering his own future care expenses.[34] [emphasis added]

The conflict between *Stein* and *Dube* was resolved by following *Stein*:

In *Dube*, Zuber J. decided that the full costs of subsidized items should not be allowed because the government contribution was not the subject of subrogation. With great respect the decision seems to clash with the same judge's decision made a year before in *Stein*...in which he had come to the opposite conclusion in much the same circumstances. The *Stein* decision was upheld by the Ontario Court of Appeal...in which Lacourcière J.A., in delivering the judgment of the court, stated that Zuber J.'s refusal to apply a reduction was justified and that the principle of *restitutio in integrum* was a complete answer to the suggestion that the injured party was recovering a windfall or that there was any double recovery involved.[35]

In *Cottrelle v. Gerrard*, Leitch J. summarized *Stein* as "the principle that government programs such as the Assistive Devices Program should not be deducted in assessing damages due to their possible non-continuance".[36] Acknowledging that some lower courts chose not to follow *Stein*, Leitch J. concluded *Stein* should have been binding on them:

In my respectful opinion, those decisions which take into account government funded programs contrast with the conclusion of the Court of Appeal in Stein. *I concur with the opinion of Dilks J. in* MacLean v. Wallace *to this effect.* In *Stein* the Court of Appeal decision focused on the appellant's submission that the future care award amounted to double recovery because the injured plaintiff was entitled to services under the Ontario Health Insurance Plan (O.H.I.P.). In *Stein* O.H.I.P. had waived its subrogation right. The Court of Appeal concluded in para. 37 that: "By reason of the appellant's obligation based on *restitutio in integrum*, it cannot be said that non-deduction of the projected cost of future government funded health care services created a windfall for the respondent...or amounted to double recovery." It was this reasoning which Mr. Justice Dilks focused on in *MacLean v. Wallace.*[37] [emphasis added]

As recently as 2005, *Stein* was applied and affirmed in another unanimous Ontario Court of Appeal decision in *Lurtz v. Duchesne*:

> *It was open to the trial judge to act upon this evidence and thus to award damages on the basis that the respondent would no longer have the drugs paid for after the judgment. The respondent should not be placed in the position of being uncertain whether those drugs will be paid for.* See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at 246–47 and *Stein v. Sandwich West (Township)* (1995), 77 O.A.C. 40 (Ont. C.A.) at paras. 39 and 40. *The trial judge was entitled to make the award on the theory that the tortfeasors, rather than the government, should be responsible for paying the cost of the medication.* The trial judge was not required to reduce this part of the claim because of contingencies.[38] [emphasis added]

Finally, the extent of the court's skepticism is very evident in *Paxton v. Ramji*, where Eberhard J. applied *Lurtz* and *Stein* to disallow a deduction for publicly funded care even for

> *a common disability that one can hardly imagine a government losing interest in assisting. Still, government policies change with the temper of the times and Jaime has a long time ahead of her.* I find she must have the benefit of the doubt, as government funding cannot be reliably predicted.[39] [emphasis added]

ALBERTA

In Alberta, case law on this subject effectively begins with *Hurd v. Hodgson*,[40] where Lomas J. refused to accede to the defendant's request for a deduction of future-care costs that would be paid by a government program. While the defendant relied on *Wipfli*,[41] Lomas J. applied *Boarelli*,[42] *McLeod*[43] and an Alberta Court of Appeal decision in *Henderson v. Vaillancourt*.[44] Notably, other than citing passages from the judgments, Lomas J. did not restate the relevant principles of provide any explanations of the authorities.[45]

The issue next appears to have been addressed in the unreported judgment of Hembroff J. in *Fitch v. Willow Creek (Municipal District)*, where he took judicial notice of the uncertainty of government programs:

> At this point something should be said concerning the potential entitlement of Ms. Fitch to certain funds as part of the Alberta Social Services program...Maureen's eligibility for these programs may be altered as a result of legal proceedings and the awarding of a judgment. *I would also observe in these times of government financial restraint, there is no certainty all or any of these programs will be continued at their present or in fact at any level. Accordingly I have not taken these kinds of programs into account in determining Ms. Fitch's entitlement to future care costs.*[46] [emphasis added]

Although Hembroff J. did not cite any authorities, the practice of taking judicial notice of the state of Canadian health care system became a common one in Alberta's courts. For example, during 1998–99, three different Alberta Court of Queen's Bench judges noted the uncertain state of provincial health care and disallowed requested deductions.

Romaine J. in *Little Plume v. Weir* applied *Fitch* to hold:

> With respect to the Defendants' suggestion that Mr. Little Plume's rental costs could be paid by AISH, *there is no evidence that Mr. Little Plume would continue to be entitled to AISH payments once he is awarded a monetary judgment*...At any rate, I agree with Hembroff, J. in *Fitch v. Willow Creek (Municipal District)* (May 20, 1993), Doc. Lethbridge 8806-1173 (Alta. Q.B.) at paragraph 157 where he observes that *in these times of government financial restraint, there is no certainty that programs such as AISH will continue at the same or any level.* I have therefore not taken the potential for AISH assistance into account.[47] [emphasis added]

Hutchinson J., in *O'Connor v. Mahabir*, explained the general principle thus:

> Deduction of benefits from future oriented heads of damages is premised on the plaintiff continuing to receive them over the relevant future period. *If it is possible that assistance may be discontinued or reduced because of a damage award where entitlement may be subject to a means test into which damages are factored, or because the government changes or eliminates the benefit program, then the less certain a Court will be that the collateral benefit sought to be deduced will in fact flow to the plaintiff and the less inclined the Court will be to make the deduction.* A number of Courts have recently refused to make such deductions where there is doubt whether the benefits will persist.[48] [emphasis added]

Hutchinson J. went so far as to elucidate a test:

> Where the benefits are future-oriented, the Court should inquire into the likelihood that they will persist into the relevant future. *If the Court is doubtful that the plaintiff will continue to receive the benefits, there should be no deduction.* This is so whether the uncertainty relates to the impact of a damages award on the plaintiff's individual entitlement (means tests), to the stability of the benefit program and its levels of coverage (fiscal restraint), or to both. If, however, the Court is satisfied that the benefits will continue to flow to the plaintiff into the future, then their value should be deducted pursuant to the compensatory principle.[49] [emphasis added]

An interesting aspect of *O'Connor* is that the onus was placed on the defendant to prove the certainty of the program's future existence and the plaintiff's continuing eligibility for it. Arguably, this is a more logical approach, as the burden of compensation is placed first and foremost on the tortfeasor, and once the amount of the damages is established, any reduction should be proven by the tortfeasor and not by the injured party.

Mason J. in *Cherwoniak v. Walker*, following *Fitch* and *Jacobsen*,[50] was also ready to take judicial notice of the state of Canadian health care:

> Although there was no evidence led at trial showing a decline in government spending, in relation to health care, like Levine, J. in *Jacobsen, I am prepared to take judicial notice of the fact that "the health care system in Canada is under significant financial pressure"*. If the Blue Cross prescription program were to become the focus of fiscal restraint, it seems reasonable to me, as was argued by the Plaintiff, that individuals with an alternate form of coverage, such as the Plaintiff, would be the first to lose the state funded benefits...[51] [citations omitted]

Finally, and most recently, *O'Connor* was also applied by Rawlings J. in *Y. (M.) v. Boutros*:

> In the case at bar, *no evidence was brought to show that the government benefits included by Dr. Hildebrand may be eliminated in the future or that the eligibility requirements may change* such that M.Y. is no longer eligible. Therefore, I find that the government benefits identified by Dr. Hildebrand should be included in the assessment of the incremental cost to M.Y. of raising D.R.
>
> *Given the lengthy history of these benefits, there is a strong likelihood that they will continue in the future.* These benefits are triggered by income level and number of children; they are not discretionary like AISH benefits. It is possible that M.Y. will increase her income and become ineligible for these benefits; it is also equally possible that these benefits will increase. *After weighing all the potential increases and decreases in benefits to M.Y. and relying on the lengthy history of government support for low income families, I decline to award a contingency for the potential future elimination of these benefits.*[52] [emphasis added]

MANITOBA

In Manitoba, courts appear never to have been too optimistic about government-funded services. As early as 1981, the Manitoba Court of Appeal, in *McLeod v.*

Palardy,[53] upheld a trial judge's decision to disallow a deduction of the value of health care services provided to a plaintiff under a provincially funded program. Specifically, Hubband J.A. was concerned that there was no certainty of plaintiff's future eligibility for the program:

> In my view the learned trial Judge was right to follow the decision in the *Boarelli* case. Indeed, the plaintiff's claim, in the instant case, is a stronger one than the plaintiff's in *Boarelli v. Flannigan*. In that case the welfare payments had been received by the plaintiff and there could be no speculation as to amount. *In the present case, whether and for how long the plaintiff would qualify under a government home care programme is speculative. Moreover, the criteria for determining who qualifies for assistance is subject to both legislative and administrative change.*[54] [emphasis added]

A plaintiff's future eligibility was again an issue in *Millett v. McDonald's Restaurants of Canada Ltd.*, where Wilson J. applied *McLeod* as establishing

> that whether and for how long the plaintiff would qualify under a government home care program is speculative, with the criteria for success in the application for such relief subject to legislative and administrative changes...Defendant, then, must bear those costs.[55]

Several years later, in *Watkins v. Olafson*, Wright J. effectively expanded *McLeod* beyond "certainty of continuing qualification" to include "recognizing other variables that could arise in respect of a government home care program".[56] While noting *Wifli* as standing for a different principle, *McLeod* was followed as a binding authority in Manitoba:

> *McLeod v. Palardy* establishes the law in Manitoba that free services and equipment that may be available through a government home care program need not be taken into account in assessing future care costs.[57]

A decade later, in *Tronrud v. French*,[58] the Manitoba Court of Appeal confirmed that *McLeod* covered both a plaintiff's continuing eligibility for a program and a continuing existence of the program itself. It may, however, be arguable that the court in *Tronrud* in fact relaxed the standard by deferring the decision on the uncertainty of each specific program to the trial judge:

> It is not necessary however to decide whether *Boarelli, supra*, should still be followed because in this case *there was evidence before the trial judge that he was entitled to rely on in concluding it was probable that the benefits in question would be provided to the plaintiff free of charge in the foreseeable future. This does not of course mean that, had I been the trial judge, I would necessarily have come to the same conclusion as the trial judge*—it means that the matter was not "speculative" and, there being some evidence to support his conclusion on this issue, it should not be interfered with. *With respect to the issue of future prescription drug expenses, the trial judge was entitled to take into account the availability of Pharmacare as a matter of notorious fact.*[59] [emphasis added]

It should be noted that subsequent to *Tronrud* there appear to have been no reported Manitoba decisions dealing with *McLeod*. Whether for lack of suitable cases or through universal acceptance, it does appear that *McLeod* has now firmly entered Manitoba personal injury law.

CONCLUSION

The question of who should bear the risk of reductions in government funded future-care benefits, as noted at the outset, has received considerable judicial attention across Canada. Presumably, this was driven by the inherent judicial

interest in providing a result that would be or at least would appear to be fair to both sides. In certain situations, this objective may not be easily achievable, as in the case of the deductibility of government funding from long-term awards of future care.

The issue seems to have been readily decided against deductibility in Ontario, Alberta and Manitoba, placing the risk squarely on the tortfeasor. It seems that only in B.C., optimistic about the government-funded future, did the courts at one time choose to place the risk on the injured party. Fortunately for the injured plaintiffs, the changing landscape of the Canadian welfare state did not escape the attention of B.C. courts, and by the mid-1990s, the non-deductibility principle became the *de facto* practice.

In the opinion of the authors, when consideration is given to the fact that cost of future-care awards relates to the provision of important and often life-sustaining health care needs, it is understandable that the courts should look to the tortfeasor to bear the risk of the uncertain government funding. It is to be hoped that courts across the country will continue in their affirmation of non-deductibility of government-funded benefits.

ENDNOTES

1. [1990] 1 S.C.R. 940 at para. 71.
2. (1874), L.R. 10 Exch. 1 at 3.
3. (1984), 56 B.C.L.R. 273 (C.A.), rev'g (1983), 43 B.C.L.R. 1 (S.C.).
4. *Wipfli* (S.C.), *supra* note 3. The "rather improbable" principle was imported by Hinds J., at para. 52, from "a statement of principle expressed by Pearson L.J. (as he then was) in *Oliver v. Ashman*, [1962] 2 Q.B. 210 at 242–243 (C.A.): "Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendants' negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered."
5. *Ibid.* at paras. 51 and 53.
6. *Wipfli*, *supra* note 3 at para. 74.
7. *Ibid.* at para. 91.
8. *Ibid.* at paras. 77 and 94.
9. *Ibid.* at para. 92.
10. (1991), 59 B.C.L.R. (2d) 195 (C.A.) at para. 34.
11. (1992), 67 B.C.L.R. (2d) 296 (C.A.) at para. 18.
12. (1996), 19 B.C.L.R. (3d) 63 (S.C.).
13. *Ibid.* at para. 199.
14. *Ibid.* at para. 200.
15. [1998] B.C.J. No. 2051 (S.C.).
16. [1999] B.C.J. No. 520 (S.C.), aff'd (April 26, 1999), Vancouver B961315 (S.C.).
17. *Elder*, *supra* note 15 at paras. 33–34.
18. *Brennan*, *supra* note 16, at para. 207.
19. *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205 [*Krangle (S.C.C.)*], rev'g (2000), 76 B.C.L.R. (3d) 1 (C.A.).
20. *Krangle* (C.A.), *supra* note 19 at para. 19.
21. *Krangle* (S.C.C.), *supra* note 19 at para. 40.
22. (2002), 99 B.C.L.R. (3d) 256 (C.A.) at para. 170, rev'd on other grounds [2003] 2 S.C.R. 477.
23. *B(M)*, *supra* note 22 at para. 27.
24. [1973] 3 O.R. 69 (C.A.) at para. 17.
25. *Ratych*, *supra* note 1 at para. 38. Although McLachlin J. undertook a lengthy examination of principles of double compensation, on the facts of the case the decision dealt solely with wage replacement benefits.
26. (1995), 77 O.A.C. 40, var'g on other grounds [1993] O.J. No. 1772 (Gen. Div.).
27. *Stein* (Gen. Div.), *supra* note 26 at para. 117.

28. As explained *supra* in note 25, McLachlin J. in *Ratych* addressed only wage replacement benefits. The "alternative pools" referred to by Zuber J. were part of the general discussion of economic aspects of collateral benefits which favoured deductibility: "Other "loss pools" contribute to collateral benefits. Insurance, whether held by the plaintiff or his employer, may provide disability benefits. Employers and employees may contribute, directly or indirectly, to wage benefits. The taxpayer may pay through the social security system and publicly funded hospital and medical benefits. Those who have considered the question of loss distribution in the context of collateral damages generally agree that economic considerations favour deductibility, although the results may vary somewhat with the nature of the benefit." (*Ratych*, *supra* note 1 at paras. 56–57)
29. [1994] O.J. No. 1720 (Gen. Div.) at para. 109, where Zuber J. awarded only 50 per cent of the costs of disability supplies "on the expectation that the Assistive Devices Programme will continue to meet the other half".
30. *Stein* (C.A.), *supra* note 26 at paras. 39–40.
31. *Ibid.* at para. 38, Lacourcière J.A. cited *Ratych*, *supra* note 1 at para. 38.
32. *Ibid.* at para. 38–39; Lacourcière J.A. appears to be applying *Boarelli*, *supra* note 24 at para. 17.
33. (1996), 4 O.T.C. 331 (Gen. Div.) at para. 76.
34. [1999] O.J. No. 3220 (S.C.) at para. 186.
35. *Ibid.* at para. 187.
36. [2001] O.J. No. 5472 (S.C.) at para. 112, rev'd on other grounds (2003), 67 O.R. (3d) 737.
37. *Ibid.* at para. 114.
38. (2005), 194 O.A.C. 119 at para. 25, aff'g [2003] O.T.C. 319 (S.C.).
39. (March 24, 2006), Newmarket 66745/03 (Ont. S.C.) at para. 57.
40. (1988), 61 Alta. L.R. (2d) 36 (Q.B.) at para. 106.
41. *Wipfli*, *supra* note 3.
42. *Boarelli*, *supra* note 24.
43. *McLeod*, *supra* note 53.
44. (1979) 13 A.R. 345 (C.A.). Clement J.A. undertook a comprehensive review of English authorities and the *Boarelli* decision (which he approved). His Lordship that there is no difference in principle between public and private insurance, and that money received by the plaintiff from his employer during the disability period were benefits and not wages, and thus not deductible (at paras. 20–21).
45. *Hurd*, *supra* note 40. Lomas J. quoted the *Boarelli* subrogation reasoning as explained in *Henderson* and the uncertainty of future benefits and approval of *Boarelli* from *McLeod*.
46. [1993] A.J. No. 1081 (Q.B.) at para. 157.
47. (1998), 220 A.R. 332 (Q.B.) at para. 123.
48. (1999), 243 A.R. 11 (Q.B.) at para. 143, var'd on other grounds (2002), 293 A.R. 352.
49. *O'Connor*, *supra* note 48 at para. 150.
50. *Jacobson*, *supra* note 12.
51. (1999), 249 A.R. 74 at para. 68.
52. (2002), 313 A.R. 1 at paras. 197–198.
53. (1981), 124 D.L.R. (3d) 506 (Man. C.A.), var'g on other grounds 4 Man. R. (2d) 218 (Q.B.).
54. *McLeod*, *supra* note 53 at para. 79.
55. (1984), 29 Man. R. (2d) 83 (Q.B.) at para. 82.
56. (1986), 40 Man. R. (2d) 286 (Q.B.) at para. 109, rev'd on other grounds [1989] 2 S.C.R. 750.
57. *Watkins*, *supra* note 56 at para. 111.
58. (1991), 84 D.L.R. (4th) 275 (C.A.), rev'g on other grounds (1989), 56 Man. R. (2d) 284 (Q.B.).
59. See *Tronrud*, *supra* note 58 at para. 20.