Calculation of Cost of Future Care Damage Awards: Contingencies for Government Benefits

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In calculation of damages for the cost of future care, plaintiffs' counsel frequently argues that a certain percentage should be added to the damage award to compensate for the contingency that the government benefit may not be available in the future due to a change in government policy, a decrease in government funding, or for some other reason. Conversely, defendants' counsel frequently argues that the cost of future care award should be reduced by a percentage based on the contingency that the plaintiff will continue to have their future care needs met to some extent by government benefits. Such arguments have had mixed success in the case law, largely dependent on whether the government benefit is discretionary in nature, as opposed to an entrenched benefit of long-standing. The more discretionary a government benefit is and the shorter the time period that it has been in place, the more likely it is that the court will grant an increase to the future cost of care award to compensate for the contingency that the benefit may be decreased or discontinued. Similarly, the more discretionary a government benefit is and the shorter the time period that it has been in place, the less likely it is that the court will discount the future cost of care award to compensate for the contingency that the plaintiff's future care needs will be satisfied by the government benefits.

The leading case on the cost of future care and a contingency that the government benefit may not continue to be available is ***Krangle (Guardian ad litem of) v. Brisco***, 2002 SCC 9, 2002 CarswellBC 64. The plaintiffs were the parents of a child born with Down's Syndrome. The defendant doctor did not advise the parents about the availability of prenatal testing that might have detected the disease. The child was permanently disabled and would require care for the duration of his life. The parents' action against the doctor in negligence was allowed. The trial judge found that the child would likely live in a group home after age 19, the costs of which would be paid by the province. The trial judge concluded that there was at least a 95% chance that the various legislative benefits the child qualified for would be available to him when he reached 19 years of age and awarded $80,000 against the contingency that this might not be the case. The

figure represented 5% of what the award would have been had the trial judge concluded that the parents were responsible for the child's adult care.

The parents appealed with respect to the quantum of damages. They were concerned that recent amendments to the British Columbia *Family Relations Act* might make them legally liable to care for the child after he turned 19, and that if they were so liable, the province might seek to recover from them the costs of the child's adult care in a group home.

The majority of the Court of Appeal allowed the parents' appeal regarding the quantum of damages, and the matter was referred back to the trial judge for an assessment of the cost of adult care. The defendant doctor appealed to the Supreme Court of Canada, seeking reinstatement of the trial judgment. McLachlin CJC stated that the issues before the court were whether the parents were entitled to damages for the child's adult care, which then raised two subsidiary issues: whether the parents would incur costs for the child's adult care based on the evidence at trial and the amended legislation, and if so, if the court was court precluded from considering the amendments because they were passed after the trial. She held:

> Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates (para. 21).

McLachlin CJC held that the parents were entitled to be reimbursed for any losses they may reasonably be expected to incur on the basis of the evidence and the law, plus an award for the contingency that the projections may not be realized. All parties agreed that the ideal place for the child when he turned 19 would be in a group home. At the time of trial, the cost of the group home was to be paid for by the province under its welfare scheme, even if the parents had the financial means to pay for it. The question was whether or not this arrangement would still exist when the child turned 19. In the view of the trial judge, there was only a 5% chance that the safety net would not be there. McLachlin CJC held:

> Viewing the matter as it stood at the time of trial, the trial judge's holding that the Krangles would incur no cost for Mervyn's adult care and $80,000 contingency award against this possibility cannot be assailed. The findings are fully supported by the evidence and the law. The only question is whether the amendments to the *Family Relations Act* passed after the trial invalidates these conclusions (para. 29).

McLachlin CJC concluded that the Court of Appeal erred in holding that the Act would impose an obligation on the parents to care for the child when he became an adult. The contingency award made by the trial judge provided adequate security against the possibility of any legislative changes; the appeal was allowed.

This 5% contingency as established in ***Krangle*** as security against a possible future change in government policy etc. has been applied in ***Jones (Guardian ad litem of) v. Rostvig***, 2003 BCSC 1222 at para 83 (cost of future care in a group home setting for child born with Down's Syndrome); ***Bosard v. Davey***, 2005 MBQB 890 at para 143 (cost of future care for child born with genetic disorder who required full time attendant care, likely residential care after the age of 19); and ***Strachan (Guardian ad litem of) v. Reynolds***, 2005 BCSC 377 at paras 94, 95 (At Home Program required for child with brain injury at birth requiring constant care).

One further case in this chain of cases applying ***Krangle*** requires more detailed discussion as it is frequently referenced in more recent authorities. In ***Fullerton (Guardian ad litem of) v. Delair***, 2005 BCSC 204 an infant was injured at birth because of the negligence of the defendant doctor. The infant was rendered severely handicapped such that he would require government assistance through the At Home Program provided by the British Columbia government. The parents claimed for a substantial cost of future care award and the trial judge denied this award on the basis that the child would be cared for at public expense through the government program in the future. The trial judge, however, applied ***Krangle*** to add a 5% contingency in the event that the government program was terminated or the benefits otherwise decreased.

The parents appealed, arguing that they should have been granted cost of future care damages and that the trial judge was in error in denying their claim on the basis that the government would take care of the child. They were successful on this point on appeal. The appellate court at 2006 BCCA 339, 55 BCLR (4^{th}) 252 held that At Home Program was essentially discretionary in

nature, and was largely dependent on whether the child received an award of tort damages, or not. They distinguished ***Krangle*** as in that case the government program was a universal benefit, analogous to welfare. For this reason the appellate court granted the cost of future care claim of the parents, and referred the matter back to the trial judge for assessment.

Donald JA, for the court, stated at para 23: "… I think it was an error to treat a discretionary benefit as though it were a universally available entitlement."

And further at para 28:

> The At Home Program is not mandated by legislation, unlike the GAIN welfare scheme [in ***Krangle***]. It is discretionary in nature and subject to competing budget allocations. As such, it is my opinion that it should be for the government, not the court, to decide who gets the benefit. By denying recovery for costs of the care prescribed by the At Home Program, the judge effectively created the conditions for continued dependence on the program.

By setting aside the award for cost of future care it is implicit that the appellate court also set aside the 5% contingency ordered by the trial judge.

In ***O'Connor v. Mahabir***, 1999 ABQB 326, 1999 CarswellAlta 364 the plaintiff brought a personal injury action against the operator of one of Calgary's light rail and train cars and the City of Calgary for damages for serious injuries sustained when he jumped in front of a train. As a result of his injuries, the plaintiff became a triplegic with a speech impediment and incontinence. The plaintiff was hearing impaired and had a history of lack of self-motivation. After the accident, he received benefits under AISH and a home care program funded by the regional health authority. Hutchinson J held that the accident was solely the responsibility of the plaintiff, and there was no negligence on the part of the defendants; however, he assessed damages on a provisional basis. The plaintiff argued that the court should find that neither the plaintiff's AISH benefits nor his home care payments should be deducted from the damage awards which would be payable to him:

> He points out that when a person's income gets to be at a certain level the benefit of the AISH program is lost with the right of recoupment for any overpayment given to the Director of the program. **He also questions the permanence of the home care program administered by the Calgary Regional Health Authority and poses the**

> **question that if the home care payments stop what will then happen to Brent O'Connor, that is to say who is going to look after him under those circumstances**? Counsel for the plaintiff says that no deduction for funds coming out of the government agency programs should be deducted from the damage awards because it has not been shown that they are continuing programs (para. 117) [emphasis added].

The defendants argued that the AISH payments and the benefits received from the regional health authority should be deducted from any award. Hutchinson J stated that the issue is whether collateral benefits should be deducted from any damages payable to the plaintiffs so as to prevent an injured plaintiff from making a double recovery in the sense of recovering full damages, like the cost of future care, without regard to any collateral benefits received from third party benefactors. The general rule is against double recovery. Hutchinson J held:

> The plaintiffs argues that neither the AISH benefits received by Brent O'Connor or the payments made to Glenn Schnider as Brent's full time care giver by the Calgary Regional Health Association should be deducted from the damage awards for two reasons. Firstly, because of the right of recoupment given to the Director of the AISH program and secondly, the uncertain funding of the home care program administered by the Calgary Regional Health Authority. He says that it has not been shown that they are continuing programs.
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> In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 (S.C.C.), Madam Justice McLachlin held at p. 25 that, absent special circumstances, wage benefits paid while a plaintiff is unable to work must be deducted from any claim for lost earnings because:
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> > ... 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 <u>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</u>. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account. [Emphasis added in original]
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> Earlier in her reasons, at p. 12, McLachlin, J. emphasized the compensatory basis of *tort* law:
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> > The trend away from a moralistic view of tort suggests that the process of assessing damages should focus not on how the tortfeasor may be appropriately punished, but rather on what the injured person requires to restore him to his pre-accident state. To focus on the alleged 'benefit" to the tortfeasor resulting from bringing collateral payments into account is to misconstrue the essential goal of

> the tort system. 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.
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> I conclude that the general principles underlying our system of tort law suggest that the damages awarded to the plaintiff should be confined to his or her actual loss, as closely as that can be calculated. The damages should be in an amount which will restore the plaintiff to his pre-account position. Where pecuniary losses ... are at stake, the measure of damages is normally the plaintiff's actual financial loss. Unless the plaintiff can demonstrate such loss, he or she is not entitled to recover. This is because an essential element of tortious liability is lacking in the absence of loss. [emphasis added in original] (paras. 130-131).

Hutchinson J held that deduction of benefits from future oriented heads of damage is premised on the plaintiff continuing to receive them over the relevant future period. If it is possible that the benefits may be discontinued or reduced because the benefit program is eliminated, then the less certain a court will be that the collateral benefit sought to be deducted will flow to the plaintiff, and the court will be less inclined to make the deduction:

> **The test seems to be that, as between the tortfeasor and the victim, the latter should receive the benefit of the doubt.** Of course, that argument does not apply to pre-trial collateral benefits already paid out without recourse to recoupment or subrogation where double recovery would not be permitted [emphasis added] (para. 143).

If a third party has compensated the plaintiff, and the third party has a right of subrogation either by statute or by common law, double recovery is avoided because that portion of the judgment flows to the third party. Hutchinson J held:

> ***Future Benefits (Assurance of Continued Payments)*** **- The assurance that benefits will continue to be paid into the future only becomes an issue if the collateral source does not have recourse to subrogation or some other means of recoupment. 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** [emphasis added] (para. 150).

In the case at bar, there was limited information concerning the operation of the AISH program and the health care program the plaintiff utilized. Under the AISH program, the Director has the right to recover any overpayments:

> Therefore Brent O'Connor may lose any or all of his AISH entitlement. In the event of a damage award for lost income, the Director will be entitled to seek proportional reimbursement. The proportions are set out in the regulations to the *Assured Income for the Severely Handicapped Act*. The Director's right of reimbursement can be retroactive since the AISH regime deems income to be received in the period to which the payment relates (s. 3.1(a)(i) of the AISH Regulation). **Accordingly, past AISH benefits should not be deducted. As for damages for loss of future income there should be no deduction because of the Director's right of recovery and the uncertainty of the continuation of the program. Even if the Director erred and failed to stop O'Connor's AISH payments, the right of reimbursement would be available upon discovering the error to address any double recovery** [emphasis added] (para. 151).

In the result, the action was dismissed because the defendants were not liable.

The plaintiff appealed from the trial judge's determination of liability and the award for cost of future care in ***O'Connor v. Mahabir***, 2002 ABCA 13, 2001 CarswellAlta 1690. Conrad JA held that the trial judge made a reversible error. She held that there was negligence by the driver, for which the City of Calgary was vicariously liable, with contributory negligence by the plaintiff. Conrad JA also agreed that there should have been a discount applied to the plaintiff's cost of future care of 35%.

In ***Labrecque v. Heimbeckner***, 2007 ABQB 501, 434 AR 181 the plaintiff was the passenger in a vehicle involved in a high-speed collision with an RCMP vehicle. The plaintiff was thrown from the vehicle and suffered severe orthopaedic and cosmetic injuries. The defendants admitted liability. The plaintiff brought an action for damages. After the accident, the plaintiff had serious physical and cognitive difficulty. Her family was able to access some funding for home care through Alberta Homecare. Macleod J held that based on the evidence, the plaintiff suffered a traumatic brain injury that contributed to her lack of ability to function normally or independently. Both the plaintiff and defense agreed that the plaintiff's future cost of care needs would continue until she was 80 years of age. Macleod J stated that AISH payments were a factor to be taken into consideration in making any adjustment for contingencies to the

plaintiff's award. The plaintiff argued that because there is no further assurance of continued AISH benefits following a monetary judgment, the AISH payments should not be taken into account; the defendant argued that if the award does not account for AISH, there was the potential for over-compensation. Macleod J held that the law in this area is unsettled. He held:

> I have reviewed the recently proclaimed *Assured Income for the Severely Handicapped Act*, S.A. 2006, c. A-45.1. It is a clear from a review of s. 3 that benefits such as those currently being made to Sarah are discretionary and in order for there to be a basis for exercising that discretion there is a means test, both in terms of income and assets. Moreover, under s. 5, someone in Sarah's position must notify the director of a change in income or an increase in assets and s. 5(4) provides that the director may vary or discontinue a benefit (para. 233).

Macleod J held that his review of the legislation showed that it intended to confer a discretion upon a Director under the Act to provide services to those who could not otherwise afford them; the plaintiff would have to inform the AISH administrators of the award, and they had the discretion to discontinue her benefits to the extent that they were provided for in the award:

> **I do not think I should anticipate how the discretion of a director under the A.I.S.H. legislation will be exercised. Nor should I relieve the defendants from paying for the cost of care requirements arising out of the accident based upon speculation that a director might continue to pay for those services from public funds. Accordingly, there will be no deduction from the award on this ground** [emphasis added] (para. 236).

In the result, the plaintiff's action was allowed.

In ***S. (K.) (Litigation representative of) v. Willox***, 2016 ABQB 483, 496 AR 42, 2016 CarswellAlta 1594, additional reasons in 2016 ABQB 654, and additional reasons in 2017 ABQB 2, and additional reasons in 2017 ABQB 71, the mother of the minor plaintiff gave birth in 2000, and her son was born severely premature. The plaintiff child developed a severe neurological condition that led to developmental delays, blindness in one eye, and severe autism spectrum disorder. The mother was under the care of the defendant doctor, who was her family physician, during her pregnancy. The defendant doctor consulted the defendant specialist after an ultrasound raised the possibility of a premature birth. On behalf of their son, the parents

commenced action and claimed that the doctors did not meet their standard of care and that the son's condition stemmed from this failure. Based on the extensive evidence before him, Moreau J held that the defendants were not liable for the injuries suffered by the plaintiff. However, damages were provisionally assessed. With respect to cost of future care, the plaintiff was always going to be dependent on others in his daily living functions. This included home care, occupational therapy, counseling, and speech language pathology. The plaintiff was only 16 at the time of trial and living at home, but questions were raised as to where he would live in the future; the possibility of a group home was raised. The plaintiff was disabled enough to qualify for funding through several government programs, including FSCD, PDD and AISH. The defendants argued that the plaintiff had been receiving PDD funding for years, and there was no indication that such funding would cease; they submitted that a 25 percent contingency in regards to future PDD funding was appropriate. The plaintiff submitted that there should be no deduction from the cost of past and future care for government programs and subsidies. Moreau J held:

> I agree with the approach adopted in *Fullerton* and the Alberta decisions cited by the Defendants and adopted by Graesser J. in *T. (A.)*. In *MacLean v. Wallace*, [1999] O.J. No. 3220 (Ont. S.C.J.), Dilks J. observed, at para 186:
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> > **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.**
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> There is evidence in the 2005-06 FSCD contract of a real prospect of both reimbursement of prior FSCD outlays and discontinuance of funding where amounts for eligible funding items are provided for in a legal action. While PDD funding is statutory, the funding decision remains, by the wording of section 1.2 of its governing legislation, within the Minister's discretion [emphasis added] (paras. 767-768).

In the result, Moreau J rejected the defendant's argument that amounts paid by FSCD to date and in the future, and by PDD in future, for the plaintiff's care should be subject to deduction.

In ***Ward (Next Friend of) v. Ward***, 2010 ABQB 654, 496 AR 42, additional reasons in 2011 ABQB 465 the minor plaintiff was a passenger in a vehicle driven by his father. While the father was making a left-hand turn, the vehicle was struck by the defendant. The plaintiff was seriously injured and commenced an action for damages against both drivers. The 16-year old plaintiff suffered extensive internal and external injuries in the collision; he was in a coma for 19 days. His injuries included multiple brain hemorrhages, diffuse axonal injuries, multiple fractures to his skull, mandible, shoulder blade, ribs and pelvis, liver lacerations, and blood and air in the space between his lungs. He was left totally and permanently disabled. Moen J held that it was not likely that the plaintiff would have finished high school if the accident had not occurred; nor was it likely that he would have completed a post-secondary program of vocational training or obtained a trade certificate. It is likely that he would have stayed living on the reserve and may have obtained a job on reserve as a laborer. With respect to cost of future care, Moen J discussed whether or not the court should award lesser costs of future care on account of several government funded programs that the plaintiff had access to. The central program at issue was Persons with Developmental Disabilities (PDD). The plaintiff argued that if PDD funding was accepted and a deduction was applied, it should be reduced by a contingency to reflect the possibility that funding for the program may not be available indefinitely; the plaintiff drew an analogy between PDD and AISH benefits. Moen J noted that the PDD program was only 13 years old, hardly qualifying for the category of stable funding. Moen J held:

> Nevertheless, when considering future cost of care, the purpose is not to provide a windfall to the Plaintiff. The difficulty in considering cases such as the one before me is whether the court should not award such damages when the government *might* cover such costs. In this case we are considering a program which has only been in existence for about 13 years. In my view this is not enough to establish that it is a program that will be available for Cory for the balance of his life. Complicating the case before me is that to date, Cory has been cared for by his family (para. 326).

There was no guarantee that the family would be willing or able to continue caring for the plaintiff for the rest of his life; further, it seemed unfair that the family would receive no compensation for doing the work that was available under a government program. Moen J held:

> I find that Cory will have some government funding available to him to help cover his future cost of care. Nevertheless, I find that the level and continued availability of the funding is uncertain. Therefore, I will fix the amount of government funding at $20,000 a year, or 50% of the $40,000 in government funding Ms. Wilson estimates Cory would receive. In doing so, I recognize that this is a somewhat arbitrary calculation. However, there is insufficient evidence to establish exactly how much funding would be available. Therefore the estimated cost of future care will be reduced by $20,000 a year to reflect government assistance (para. 332).

The issue of the appropriate percentage contingency to add to the cost of future care award on the basis that the government benefits may not be available in the future has been recently addressed by the British Columbia Court of Appeal in ***Warick v. Diwell***, 2018 BCCA 53. The female plaintiff, age 52, was rendered paraplegic in a 2009 motor vehicle accident. The trial judge took into account the services provided by Alberta Health and the plaintiff's daughter and found that they were inadequate in setting the award for the future care needs of the plaintiff. The future care award was reduced by 60%, however, to account for the increasing availability of publicly funded services as the plaintiff's needs increased. In a cross-appeal the plaintiff contended that the trial judge erred in his application of contingencies to assess that her future home care needs would continue to be publicly funded. In addition to arguing against the 60% contingency reduction, the plaintiff had argued for a contingency to address the risk that the public funds may be lost in the future. The trial judge held that it was unlikely that her care would not be funded publicly in the future, and declined to add any contingency.

The cross-appeal was dismissed, and the trial judge was held to have applied the contingencies in a reasonable manner. B. Fisher JA for the appellate court stated:

> **66** Ms. Warick submits that *Fullerton (Guardian ad litem of) v. Delair*, *2006 BCCA 339* is applicable to this case. There, this Court held that it was an error for the trial judge "to treat a discretionary benefit as though it were a universally available entitlement". However, the program at issue there, the "At Home" program then administered by the Ministry of Child and Family Development, was not mandated by legislation, and was available to a plaintiff only where no tort compensation was paid. Similar considerations applied in *K.S. (Litigation Representative of) v. Willox*, *2016 ABQB 483* at paras. 757?68.
> **67** In this case, there was no evidence that tort compensation to Ms. Warick would affect her eligibility or entitlement to receive the home care services provided by AHS, and there was evidence that her eligibility or entitlement would not be affected if she

> purchased additional support. In this sense, the AHS services are similar to the welfare benefits considered in *Krangle*. This distinction was recognized by Donald J.A. in *Fullerton* at para. 7.
> **68** I do not agree with Ms. Warick that the services provided by AHS can properly be described as a discretionary benefit that should not be taken into account in assessing the cost of future home care. This is not to say that there are no discretionary aspects to these services, but those discretionary aspects are in relation to the amount of home care AHS will provide. They do not affect Ms. Warick's eligibility and entitlement.

Thus the extent to which a government benefit is discretionary seems to be key-is the entitlement to and quantum of benefits received discretionary in nature, or the government program short-lived, or is the entitlement to the government benefit entrenched, within the context of a long-established government program? The more discretionary in nature the government benefit, the more likely it seems that the court will apply a contingency to the calculation of future cost of care damages.

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