DAMAGES ISSUES IN HEALTH LAW

Area of Coverage - Health Industry Services

I. Deductibility of Government Funding

a. Alberta Funding

In most matters involving compromised infants the largest head of damages is the claim for cost of future care. Severely compromised infants often require specialized care and aids to daily living for the rest of their lives. In circumstances where the injury does not have a corresponding reduction in life expectancy, future costs might be quantified for 70-80 years. This often translates into a substantial damages claim.

In almost all cases there is a divergence between expert positions on the costing of future care that is not predicated on the care needs; rather, the divergence is on whether the cost of future care should be offset by the availability of government funding for handicapped individuals.

For the sake of framing the issue we can refer to a program in Alberta known as the Persons with Developmental Difficulties Program ["PDD"], which provides support and funding for individuals that meet the following criteria:

- Must be at least 18 years old when services commence;
- Must have a developmental disability;
- Must have acquired the developmental disability before turning 18 years old;
- Must be a Canadian citizen or permanent resident as defined by the Canadian Immigration and Refugee Protection Act;
- Must reside and plan to receive services in Alberta; and
- Must not reside in a facility or institution under the jurisdiction of another legislative authority.

http://www.seniors.alberta.ca/PDD/ProgramPolicy/start.htm

[In the context of this discussion it is important to note that the criteria for PDD funding does not include a "means test"][1]

Another Alberta government support program is known as the Assured Income for the Severely Handicapped Program ["AIISH"] and has the following criteria:
• You must have a severe handicap that is permanent and substantially limits your ability to earn a living. Your disability must be the main factor, not your age, lack of education or available jobs. There must not be training, rehabilitation or medical treatment that would materially improve your condition.
• Your income and the income of your cohabiting partner must not exceed the limits allowed under the program.
• Your assets and the assets of your cohabiting partner must not exceed the limits allowed under the program.
• You must be 18 years old or older and not eligible to receive an Old Age Security pension.
• You must be a permanent resident of Alberta.
• You must not be residing in an institution (e.g. a correctional centre or a psychiatric hospital).
• You must apply for all other income benefits you are eligible for (e.g. Canada Pension Plan disability benefits).


[Emphasis added]

The two government programs referenced above are typically in the forefront of the debate about the deductibility of government funding in Alberta.

b. Collateral Benefits

The Alberta decision of O'Connor quoted from Personal Injury Damages in Canada by Cooper-Stephenson and Saunders at page 592 and 593, which states:

Once again, the initial question is whether publicly-funded income - replacement benefits are to be treated as within the “insurance exception” - whether the emphasis will simply be on its insurance character, or whether its character was private and the product of individual foresight, self sacrifice and thrift will be the determinant.

Once again, it is strongly arguable that, in light of the general deduction thesis which underpins Ratych and Cunningham, welfare payments should be deducted since they are not the product of individual thrift and foresight and therefore do not fit within the principle lying behind the insurance exception.

Justice Hutchinson found that the current position of collateral benefits in Canada is that, as a general rule, where a collateral benefit is received to offset a loss, double recovery is not permitted:

The general principle may apply to all publicly funded benefits, although thus far the lower courts have not taken this approach where the plaintiff has made an identifiable contribution to a public scheme. A strong argument can be made that the basic deduction principle should be applied to all benefits available to the Canadian population as a whole or to all persons in a particular province.

One of the basic tenets in tort compensation is that a plaintiff should be returned to his original position, to the extent that a monetary award can accomplish this. Plaintiffs are not to be placed in a better