
CANADA / JUDGMENT

M.B. v. British Columbia

2002 BCCA 142

COURT

British Columbia Court of Appeal

DECIDED

28 February 2002

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2002BCCA0142

Citation:

M.B. v. British Columbia

Date: 20020228

2002 BCCA 142

Docket:

CA27265

Registry: Victoria

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

M.B.

PLAINTIFF

(RESPONDENT)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF

THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

(APPELLANT)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Smith

J.J.L. Hunter, Q.C. and

T.H. MacLachlan, Q.C.

Counsel for the Appellant

G.M. Dickson, Q.C.

Counsel for the Respondent

Place and Dates of Hearing:

Vancouver, British Columbia

November 5, 2001

Place and Date of Judgment:

Vancouver, British Columbia

February 28, 2002

THIS IS A CASE IN WHICH THE PLAINTIFF SHOULD NOT BE REFERRED TO BY NAME OR OTHERWISE IDENTIFIED. SHE IS NOW AN ADULT BUT WAS A CHILD AT THE TIME OF THE RELEVANT EVENTS.

Supplementary Written Reasons by:

The Honourable Madam Justice Prowse

Concurring Reasons in part by:

The Honourable Mr. Justice Mackenzie (Page 56, para. 99)

Concurring Reasons in part by:

The Honourable Chief Justice Finch (Page 67, para. 122)

Dissenting Reasons in part by:

The Honourable Mr. Justice Hall (Page 69, para. 126)

Dissenting Reasons in part by:

The Honourable Mr. Justice Smith (Page. 82, para. 146)

Disposition of the Court: (Page 96, para. 175)

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

- [1] On May 3, 2000, Madam Justice Levine found the appellant (the "Crown") liable to M.B. for a sexual assault perpetrated upon her in 1976 by her foster father. Levine J. awarded damages against the Crown in the amount of \$172,726.04, including damages for "past loss of earning capacity" in the net amount of \$10,000. (The latter amount was arrived at by deducting social assistance benefits in the amount of approximately \$122,000 received by M.B. prior to trial from a gross award under this head of approximately \$132,000.) Madam Justice Levine also awarded M.B. pre-judgment interest on the amount of damages for past loss of earning capacity in the amount of \$18,551.25. The judgment of Levine J. is reported at 2000 BCSC 735.
- [2] On March 27, 2001, a majority of this Court (sitting in a panel of three) upheld Levine J.'s finding of liability against the Crown: *M.B. v. British Columbia*, 2001 BCCA 227, 87 B.C.L.R. (3d) 12. However, Mr. Justice Mackenzie, speaking for the majority on the issue of damages, allowed the Crown's appeal with respect to damages by, amongst other things, substituting an award of \$50,000 for "past loss of opportunity to earn income", without deduction of social assistance benefits. Mr. Justice Mackenzie expressed the view (at para. 106) that "the income assistance arrangement is a collateral matter between the plaintiff and the provincial government that should not influence the quantum of the tort award."
- [3] Following the release of judgment in this Court, counsel applied in writing for clarification of this Court's decision with respect to the award for past loss. As a result of further communications with counsel with respect to this issue, and with respect to an additional issue concerning the appropriate method of calculating interest on the past loss, the Court concluded that these issues were of sufficient importance that a five-judge panel should be convened to decide them. The decision to sit with a five-judge panel was also influenced by the fact that the issue of deductibility of social assistance benefits from damage awards had previously been dealt with by this Court in *M.(M.) v. F.(R.)* (1997), 52 B.C.L.R. (3d) 127, and *Jones v. Trudel* (2000), 74 B.C.L.R. (3d) 263.
- [4] No order has been entered in the Court of Appeal proceedings pending the decision of these two outstanding issues. On December 6, 2001, however, the Crown was granted leave to appeal to the Supreme Court of Canada with respect to the issue of liability. Leave may also be sought with respect to the issues of damages, once resolved.

ISSUES

- [5] The two issues now before the Court are:

- (a) Did the trial judge err in deducting social assistance benefits from the award for past loss of earning capacity? (b) Did the trial judge err in awarding interest on past loss of earning capacity as special damages by calculating interest on the basis that the entire loss was suffered at the date of the sexual assault?
- [6] Counsel agree that, if the trial judge did not err in deducting social assistance benefits from the award for past loss of earning capacity, then the answer to the second issue is moot since the amount of the social assistance payments paid to M.B. to the date of trial far exceeds the amount of \$50,000 awarded by this Court for past loss of earning capacity.

FACTUAL BACKGROUND

- [7] Full details of the factual background giving rise to this appeal are set forth in the reasons for judgment of Madam Justice Levine and reiterated in the earlier decision of this Court. Suffice it to say for the purposes of this aspect of the appeal, that M.B. was sexually assaulted by her foster father in July 1976 when she was 15 years of age and a temporary ward of the Superintendent of Child Welfare. The sexual assault consisted of an attempted rape of M.B. when she was at home ill. Prior to being placed in foster care, M.B. had also been sexually assaulted by her natural father on numerous occasions. All of these assaults had a devastating effect on her life.

THE TRIAL DECISION

- [8] Madam Justice Levine's conclusion with respect to the past loss of earning capacity suffered by M.B. for which the Crown was liable is set out at paras. 313-14 of her reasons:

The plaintiff has earned very little in the period from 1987 through 1998. Her tax returns indicate T4 earnings of \$6,489, unemployment insurance of \$3,750 and workers' compensation of \$7,421. She received income assistance from the province of \$122,320.96 between September 1991 and November 1998. There is no question that the sexual assault by [the foster father] caused the plaintiff loss of earning capacity up to the date of trial. Taking into account the plaintiff's personal characteristics, all of the contingencies associated with earning income, and the required deduction from any award of the amount of income assistance received (see *M.(M.) v. F.(F.)*) at p. 183, I assess her damages from that past loss at \$10,000.

- [9] The latter paragraph contains the only reference in the judgment to deductibility of social assistance benefits. This is not surprising as Madam Justice Levine was bound by the decision of this Court in *M.(M.)*, *supra*.
- [10] Madam Justice Levine was not asked to, nor did she, address the question of the amount of court order interest payable on the award for past loss. Counsel agreed, however, that interest should be calculated on the award of \$10,000 as special damages based on the entire loss having been suffered at the time of the sexual assault. This resulted in an interest award in the amount of \$18,551.25.

THE DECISION OF THIS COURT

- [11] As earlier noted, this Court reduced the award of damages for "past loss of capacity to earn income" from a gross award of \$132,320.96 to \$50,000, without deducting social assistance benefits received by M.B. prior to trial. This Court did not deal with the issue of how interest should be calculated on that award.

DISCUSSION OF ISSUES

A. Deductibility of Social Assistance Benefits

(1) Position of the Parties

- [12] Counsel for the Crown submits that Madam Justice Levine was correct in deducting social assistance benefits from the award for past loss of earning capacity in accordance with the decisions of this Court in *M.(M.) and Jones*, supra. Counsel further says that deductibility of these benefits accords with the principles set out in the decisions of the Supreme Court of Canada in *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940, and *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 and, in particular, with the general principle against double recovery. In that regard, counsel submits that these benefits constitute a substitute for past wages, or earnings, and that they do not fit within either the private insurance or charitable gifts exceptions to the general rule against double recovery.
- [13] Counsel for M.B. acknowledges that the trial judge had no alternative but to follow the decisions of this Court in *M.(M.) and Jones*. She submits, however, that those cases were wrongly decided and should be reconsidered. In her view, social assistance benefits are not compensatory in nature. They are not a substitute for wages or earnings and their receipt by the victim of a tort does not, therefore, result in double recovery. Counsel relies on the nature and purpose of the relevant legislation under which the benefits were granted in support of this submission.
- [14] In the alternative, counsel for M.B. submits that these benefits are not deductible by analogy to either the private insurance exception or the charitable gifts exception to the general rule against double recovery. She concedes that neither analogy is perfect, but says that, when the legislative intent underlying the benefits is examined, together with considerations of public policy, there is a principled basis for interpreting the exceptions against double recovery to include these benefits. With respect to the argument that these benefits are non-deductible as being analogous to charitable gifts, counsel for M.B. places particular reliance on the analysis of Mr. Justice Donald, speaking in dissent, in *M.(M.)*.

(2) Fundamental Principles

- [15] There is no dispute concerning the fundamental principles which underlie an award of damages to the victim of a tort. They include the principle that an injured person should be compensated for the full amount of his or her loss, but no more; that damages should put the injured person in the same position he or she would have been but for the injury, insofar

as that is possible; that the award is to be fair to both the plaintiff and to the defendant; and that the emphasis underlying an award of damages should focus on compensation to the victim, rather than on punishment of the wrongdoer. As a general rule, double recovery is not permitted, subject to recognized exceptions to which I will refer in due course.

(3) Collateral Benefits

- [16] Critical to any discussion of the rule against double recovery is a consideration of what are known as "collateral benefits". In general terms, collateral benefits are payments or benefits received by a tort victim (aside from the damages being claimed against the tortfeasor) which the tort victim would not have received but for the tort. The most common of these benefits are: private insurance proceeds, gifts from friends, contributions from charitable organizations, and a variety of statutory benefits, including Canada Pension Plan, Employment Insurance, disability pensions, social assistance benefits, subsidized medical care, workers' compensation, criminal injuries compensation, no-fault automobile insurance benefits, and so on. (In this case we are dealing only with social assistance benefits.)
- [17] Because the receipt of collateral benefits by the victim of a tort gives rise to the potential for double recovery and, thus, overcompensation of the victim, the question that frequently arises is how these benefits should be treated by the courts, or by the parties in the settlement of a tort claim.
- [18] The case law and literature on collateral benefits suggest several potential solutions to the problem of how they should be dealt with by the courts. One solution is simply to ignore the benefits and to permit the victim of the tort to keep them without regard to their nature or whether they result in double recovery. A second solution is to deduct all of these benefits, assuming that their receipt would result in double recovery. A third solution is to permit the victim to keep the benefits but to provide a right of subrogation to the payor of the benefits against the tortfeasor. A fourth solution is to impose a trust on the benefits paid to the victim in favour of the payor.
- [19] An extra-judicial solution to this problem would be for the Legislature to enact legislation dictating how these benefits are to be treated, as has been done in relation to welfare payments, in particular, in England.

(4) Exceptions to the Rule Against Double Recovery

- [20] The treatment of collateral benefits is inextricably linked to the rule against double recovery, since, in many cases, the receipt of these benefits by the victim of the tort will result in double recovery, at least to the extent that these benefits overlap with a head of damage in the overall damage award. The courts, however, have consistently recognized and affirmed two exceptions to the rule against double recovery: the private insurance exception and the charitable or benevolent gifts exception. Since both of those exceptions are relied upon by counsel for M.B. as alternative bases for justifying the retention of social assistance

benefits by M.B., I will refer to them at some length.

(a) The Private Insurance Exception

[21] The history of the private insurance exception to the rule against double recovery was canvassed by both Mr. Justice Cory and Madam Justice McLachlin (as she then was), speaking for the majority and the minority, respectively, in *Cunningham*, supra. There, Mr. Justice Cory noted that the private insurance exception to the rule against double recovery, whereby payments made pursuant to a private policy of insurance for loss of wages are not deducted from the lost wages claim of a plaintiff, had been the law in Canada and in England for well over a century. He observed that the rule had its genesis in the decision of *Bradburn v. Great Western Rail Co.*, [1874-80] All E.R. Rep. 195 (Ex. Div.), in which the original justification for the exception was set forth in the reasons of Pigott B., at p. 197 of that decision:

... I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying by for a rainy day." He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. It is true that there must be the element of accident in order to entitle him to the money; but it is under and by reason of his contract with the insurance company, that he gets the amount; and I think that it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants. [22] Mr. Justice Cory noted that the basis for the private insurance exception later shifted from the primarily causal analysis set out in *Bradburn*, to the rationale that where the plaintiff had demonstrated forethought and prudence in obtaining insurance, the benefit should enure to the plaintiff and not the defendant. This reasoning was adopted by the House of Lords in *Parry v. Cleaver*, [1969] 1 All E.R. 555, and was referred to by Mr. Justice Cory as a justification for the exception on the basis of fairness. At para. 82 of the *Cunningham* decision, after noting that *Bradburn* had been consistently applied by Canadian courts, Mr. Justice Cory stated:

I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security.

- [23] Cory J. went on to add that he could see no reason why a tortfeasor should benefit from the sacrifices made by a plaintiff in obtaining an insurance policy to provide for lost wages. Further, in his view, the private insurance exception should be extended to include insurance benefits flowing from a collective agreement. At paras. 88 and 89 of the decision, Cory J. stated:

To say that the exception applies only to private insurance, where actual premiums are paid to the insurance company, would create barriers that are unfair and artificial. It would mean that top management and professionals who could well afford to purchase their own insurance would have the benefit of the insurance exception, while those who made the same provision and made relatively greater financial sacrifices to provide for the disability payments through their collective bargaining agreement would be denied the benefits of the insurance exception. This would be manifestly unfair. There is no basis for such a socially regressive distinction. Union representation and collective bargaining are recognized as a means for working people to protect their interests. The benefits for which employees have bargained in good faith should not be sacrificed simply because the mode of payment for the disability payments is different from that in private insurance contracts. Where evidence is adduced that an employee-plaintiff has paid in some manner for his or her benefits under a collective agreement or contract of employment, the insurance exception should apply. It would be unjust to deprive employees of the benefits which, through prudence and thrift, they have provided for themselves.

- [24] Madam Justice McLachlin, speaking for the minority in Cunningham, agreed that the private insurance exception to double recovery should continue to be recognized. In her view, however, that exception should be confined to situations where there was evidence that the plaintiff had contributed to the insurance scheme from which he or she benefited. She did not regard it as sufficient for the plaintiff to assert that there was a contribution by virtue of the plaintiff being the beneficiary of a collective agreement negotiated with the employer on behalf of all employees. She clearly favoured restricting the private insurance exception within narrow limits, rather than expanding it to fit a broader spectrum of plaintiffs. This accorded with her analysis of the law in England which was moving toward general deductibility of almost all collateral benefits, primarily through legislative reform. It also accorded with the views of many academics writing in the area of damages, who almost universally favour a strict rule of deductibility of collateral benefits including, in some cases, collateral benefits provided for by private insurance funded by the plaintiff.

- [25] In the result, I have concluded that it is unnecessary to resolve the question of whether the social assistance benefits received by M.B. can be brought within the private insurance exception to the double recovery rule. It is clear, however, that the law in Canada not only recognizes the private insurance exception to the rule against double recovery, but it has taken an expansive interpretation of that exception.

- (b) The Charitable Gifts Exception [26] The charitable gifts exception to the double recovery rule is also discussed in *Cunningham*. Although that exception was not in issue in those proceedings, there was no dispute that the charitable gifts exception was well established in English and Canadian law and that it should be retained. Madam Justice McLachlin discussed the charitable gifts exception at p. 370 of her reasons:

The first exception to the rule against double recovery is the case of charitable gifts. If a plaintiff is injured and his neighbour brings him a basket of groceries or donates to him a sum of money, the law will not deduct the value of the basket from the damages which the negligent defendant must pay nor require that the monetary gift be called into account. This exception reflects the concern of the courts who initiated it that people should not be discouraged from aiding those in misfortune. Arguably, it also reflects the reality that in most cases it would be more trouble than it is worth to require the courts to hear evidence and rule on the value of charitable assistance.

- [27] This exception has also been held to apply to disaster funds set up for victims, including victims of torts, for the purpose of alleviating their losses. The leading case in that regard is *Redpath v. Belfast and County Down Railway*, [1947] N.I. 167 (K.B.), where such a fund was contributed to by members of the public to assist the victims of a train accident caused by the negligence of the servants of the defendant railway. The proceedings came before the court on a motion by the defendants to compel the plaintiff to answer questions about moneys he had received from the disaster fund, with a view to having them taken into account in the assessment of damages. The defendant submitted that the moneys received should be set off against the plaintiff's claim for damages for past wage loss. The plaintiff opposed the motion on the basis that the information sought was irrelevant to the issue of damages. The court agreed with the plaintiff and dismissed the defendant's motion.

- [28] Andrews L.C.J. noted that there was no evidence that the moneys paid from the disaster fund were directed toward any particular head of damage and, further, that if the defendants should succeed in their motion, the likely effect would be "that the springs of private charity would be found to be largely, if not entirely, dried up." After reviewing various authorities, he concluded as follows, at p. 175 of the decision:

In these circumstances common sense and natural justice appear to me to rise in revolt against the proposition that the money so subscribed should be diverted from the objects whom the subscribers intended to benefit in order to be applied in reduction of the damages properly payable by the wrongdoer as compensation to the victims for their loss. Why, one may well ask, should the defendants' burden be lightened by the generosity of the public? It is for the party who is in default to pay for such damage as he has caused and which is directly occasioned by his negligence without bringing into the account in reduction of his liability any moneys which may be received by the injured party without legal right from a fund voluntarily subscribed from charitable motives by third parties after the damage had accrued. The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damages. The creation of the fund was a circumstance of a wholly independent or collateral character to the defendants' negligence. . . .

Thus, the decision that these moneys should not be taken into account relied on principles of remoteness, public policy and fairness.

[29] The case most frequently cited in discussing the charitable gifts exception to the double recovery rule is *Parry v. Cleaver*, supra, particularly the judgment of Lord Reid. At p. 14 of the decision, Lord Reid stated:

. . . I take first the case of benevolence. I do not use the word "charity" because, rightly or wrongly, many people object to it. I know of no better statement of the reason [for this exception] than that of Andrews C.J. in *Redpath v. Belfast and County Down Railway* [citation and quotation omitted]. It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer. [Emphasis added.]

[30] Subsequent to the decision in *Parry v. Cleaver*, two other cases were decided in England which are relevant to this discussion.

[31] In *Lincoln v. Hayman*, [1982] 2 All E.R. 819, the English Court of Appeal held that a type of welfare payment, called "supplementary benefit", received by a plaintiff pursuant to the Supplementary Benefits Act 1976, were deductible from his claim for past wage loss arising out of a motor vehicle accident. At p. 822 of the decision, Dunn L.J. referred to the rule against double recovery and the two exceptions to it. With respect to the charitable gifts exception, he observed that the reason commonly given for the exception was that it was presumed that the benefactor intended the gift to be for the benefit of the victim and that it not be deducted. Applying that reasoning to social assistance benefits, Dunn L.J. stated:

Where as here there is no indication in the statute as to the intention of Parliament I ask myself whether the payment of supplementary benefit is so remote from the damage caused in the accident that it should not be taken into account? The payments were made to the plaintiff because he was in need as a direct consequence of the injuries he suffered in the accident. They were made as of right, and if they are not deductible from his damages the plaintiff will pro tanto achieve double recovery, which is contrary to the basic principle of damages as compensation for loss actually suffered. To say that it is wrong that the tortfeasor should benefit from payment of supplementary benefit seems to me to ignore the realities of personal injuries litigation. In the great majority of the cases the damages will be paid by an insurance company, and the effect of not deducting supplementary benefit will be to increase premiums to employers and motorists, who together form a large section of the public. Moreover, if supplementary benefit is not deductible it will be in the interests of plaintiffs not to proceed expeditiously with their claims, so as to increase the element of double recovery. For all those reasons I think the judge was wrong not to deduct the amount of supplementary benefit received by the plaintiff from his special

damage, and I would allow the appeal against damages accordingly.

- [32] Similarly, in *Hodgson v. Trapp*, [1989] 1 A.C. 807, the House of Lords concluded that an attendance and mobility allowance payable to the victim of catastrophic injuries suffered in a motor vehicle accident should be deducted from the award of damages. After distinguishing the leading Australian authority which provided for non-deductibility of similar benefits (*National Insurance Co. of New Zealand Ltd. v. Espagne* (1961), 105 C.L.R. 569 (H.C.)), Lord Bridge questioned the utility of approaching this issue from the point of view of legislative, or donor, intent. In his view, the question was not so much one of statutory construction as one of public policy. In that regard, he emphasized the fact that the statutory benefits in issue in that case overlapped with a head of tort damage such that it was apparent that there was double recovery. I observe that, to the extent that the benefits in *Hodgson* may be analogous to those offered under the no-fault provisions of the Regulations to the B.C. Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, they would also be deducted in this jurisdiction.
- [33] Since the foregoing cases were decided, Parliament in England has enacted the Social Security (Recovery of Benefits) Act 1997 (U.K.), 1997, c. 27, which provides, amongst other things, for deduction by the tortfeasor of the value of welfare and other benefits paid to the victim of a tort from damages, and the payment of the value of those benefits by the tortfeasor to the state. The schedules to the Act retain the concept of "heads of damage", and benefits attributed to each of those heads of damage are deducted. The provisions apply only to those benefits paid within five years of the injury. The specific mechanisms providing for deduction and recovery are detailed and it is not useful to review them here. Suffice it to say that the Act does not appear to extend deductibility to include charitable gifts made by third parties.
- [34] The leading Canadian case on the issue of the deductibility of social assistance (welfare) benefits from damage awards in tort prior to the *Ratych* decision was the decision of the Ontario Court of Appeal in *Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4. There, the trial judge invited the jury to deduct welfare benefits received by the plaintiff when he was off work as a result of his injuries, from the award for past income loss, and they did so. On appeal, new evidence was adduced to show that the plaintiff had executed an assignment in favour of the municipality of any moneys he was to receive as a result of the accident. It was common ground that, if this information had been before the trial judge, the welfare benefits would not have been deducted, as there was no prospect of double recovery with respect to them. Although the new evidence was sufficient grounds for ordering a new trial, the Court of Appeal made a point of addressing the substantive issue of whether social welfare benefits were, as a matter of law, deductible from an award of damages in tort.

[35] The court concluded that welfare benefits were sufficiently analogous to charity to fall within the charitable gifts exception to the rule against double recovery. In coming to that conclusion, the Court placed particular reliance on the decisions of *Redpath* and *Parry v. Cleaver*, *supra*. Mr. Justice Dubin, speaking for the Court, stated:

In addressing myself as to whether welfare payments received by an injured party while unemployed as a result of an accident or other injury under such statutes as the General Welfare Assistance Act, R.S.O. 1970, c. 192, or Family Benefits Act, R.S.O. 1970, c. 157, I view these payments as benefits provided to persons in need, independent of any cause of action such person may have or assert, and as a benefit provided to him not in diminution of any claim the injured person may have for damages. Answering the query of Lord Reid [in *Parry v. Cleaver* at para. 29 above], I do not think that the Legislature intended them to be for the benefit of the wrongdoer. [at p. 8] * * * 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. [at p. 9]

[36] The court in *Boarelli* then went on to discuss the deductibility of a broad range of benefits, other than welfare benefits. It is unnecessary for the purpose of this appeal to deal with that aspect of the judgment which has, in any event, been overtaken by the later decisions of the Supreme Court of Canada in *Ratych* and *Cunningham*. I would observe at this point, however, that I can find nothing in either *Ratych* or *Cunningham* which purports to overrule *Boarelli* insofar as it relates to the non-deductibility of welfare benefits. The deductibility of those benefits was not in issue in either of the Supreme Court of Canada decisions. It is fair to say, however, that, in *Ratych*, Madam Justice McLachlin disapproved of *Boarelli* insofar as it pronounced on the deductibility of a broad range of other collateral benefits. In her view, *Boarelli* adopted a far too expansive view of the non-deductibility of other benefits. I also note, however, that the majority in *Cunningham* took a more expansive approach to the non-deductibility of benefits than did Madam Justice McLachlin in *Ratych*.

[37] The final two cases to which I will refer are the decisions of this Court in *M.(M.)* and *Jones v. Trudel*. As earlier noted, Madam Justice Levine followed the *M.(M.)* decision in concluding that the social assistance benefits paid to M.B. should be deducted from the award for past loss of earning capacity.

- [38] M.(M.) bore some similarities to this case in that it involved the assessment of damages in relation to the victim of sexual abuse perpetrated upon her by the son of her foster parents between 1969 and 1978. The action was brought by the plaintiff against both the son and the foster mother. The action against the son succeeded; the action against the foster mother was dismissed.
- [39] The trial judge made no award for past wage loss on the basis that the social assistance benefits received by the plaintiff prior to trial were roughly equivalent to what she would have earned had the abuse not occurred and were deductible under that head of damage. The trial judge concluded that the reasoning in *Boarelli* on this point had been overruled by the majority decision in *Ratych*. On appeal, the plaintiff argued, amongst other things, that the trial judge erred in deducting social assistance benefits from the award for past wage loss on the basis that these benefits fell within the charitable gifts exception to the rule against double recovery.
- [40] In this Court, Mr. Justice Esson, speaking for the majority, agreed with the trial judge that the reasoning upon which *Boarelli* was based with respect to the deductibility of welfare benefits had been overruled by the majority in *Ratych*. Mr. Justice Esson went on, however, to consider the question of whether these benefits were, nonetheless, non-deductible on the basis that they fell within the charitable gifts exception to double recovery. Esson J.A. quoted the passage from Madam Justice McLachlin's reasons in *Cunningham* which I have quoted at para. 26 above. In the result, he concluded that social assistance benefits did not fall within the rationale given by McLachlin J. for the charitable gifts exception. At para. 166 of *M.(M.)*, Esson J.A. stated:
- The importance of this passage [from *Cunningham*] is in explaining the rationale for exempting charitable gifts from the rule against double recovery. Primarily, it rests on the concern that "people" should not be discouraged from aiding those in misfortune. Secondly, it reflects the reality that fixing the value of such assistance would be more trouble than it is worth. Neither of those considerations, in my view, can apply to welfare payments. I am, therefore, in agreement with the conclusion of the trial judge that such payments are not an exception to the general rule against allowing double recovery.
- [41] In dissenting reasons, Mr. Justice Donald concluded that *Boarelli* had not been overruled by the majority in *Ratych* and that, in any event, social assistance benefits were sufficiently analogous to charitable gifts that they should be included in the charitable gifts exception to the rule against double recovery.
- [42] In his discussion of the *Boarelli* decision, Mr. Justice Donald noted that, in England, the question of the deductibility of social assistance benefits, which had been left open by Lord Reid in *Parry v. Cleaver*, had been answered in favour of deductibility in the later decision of the English Court of Appeal in *Lincoln v. Hayman*. (It does not appear that *Hodgson v. Trapp* was drawn to the attention of the Court.)

- [43] Mr. Justice Donald did not find the Lincoln decision (discussed above at para. 31 above) persuasive. He noted that Lincoln did not consider cases involving intentional torts, such as sexual assault, where it could not be assumed that there would be an institutional insurer to spread the loss. Further, he noted that there was no basis for finding that social assistance benefits were sufficiently generous in Canada that victims of torts would be likely to delay their trials so that they could benefit from double recovery in the event that these benefits were not deducted. (I agree with Mr. Justice Donald that this seems highly improbable given the subsistence level at which many of those on social assistance exist.) Finally, he noted that the public response to double recovery might well be different in cases of sexual assault where the public would likely regard the offender as unfairly benefiting from the social safety net at the expense of the victim in the event the benefits were deductible.
- [44] Mr. Justice Donald noted that Ratych and Cunningham dealt with wage benefits and that, although Madam Justice McLachlin in Ratych disapproved the broad-based deductibility approach taken by the court in Boarelli, she did not reject the analysis of the decision insofar as it dealt with the deductibility of welfare payments.
- [45] Finally, Mr. Justice Donald examined the nature and scope of the B.C. Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27, and drew the following conclusions from that legislation (at paras. 85 and 86):

Two points arise from a consideration of the nature and scope of the Act. The scheme is society's collective response to the needs of the poor, a task once undertaken by religious institutions but now thought to be more effectively discharged by a public agency with a stable funding base provided by all taxpayers. The scheme arises from the notion that we are our brothers' keepers and that we must show compassion for the poor. In that sense the scheme is undoubtedly charitable in nature and clearly falls within the recognized exception in Boarelli. The second point is that welfare takes myriad forms, all of which have a value and cost. If direct payments are to be deducted, what about the other benefits that may be provided such as social services, housing, health care, day care and so on? Arguably, the full value of the package of benefits received by a tort claimant would have to be deducted, because in principle they replace what an income from employment would purchase. This would be highly problematic in assessing damages. In my view, it is inappropriate to deduct welfare benefits of any kind.

- [46] In summary, Mr. Justice Donald found that social assistance benefits should be treated as falling under the charitable gifts exception to the rule against double recovery.
- [47] M.(M.) was considered by this Court in *Jones v. Trudel*. There, the plaintiff was injured in a motor vehicle accident and received over \$32,000 in social assistance payments prior to trial. Counsel had agreed that these payments would be repaid to the Ministry of Human Resources. The trial judge, therefore, did not deduct the amount of the payments received from the award for past loss of income. Her order included a term that the amount of "\$32,184.00 of the aforesaid award for past income loss be paid by the Defendant to the Plaintiff in trust for the Ministry of Human Resources, representing social assistance

benefits received by the Plaintiff." This Court upheld the trial judge's decision. In so doing, Mr. Justice Lambert, speaking for the majority, commented on the M.(M.) decision as follows (at para. 55):

The applicable principles are settled for this Court by our judgment in *M.(M) v. F.(R.)* (1997), 101 B.C.A.C. 97 (B.C.C.A.). The majority in that case decided that in order to prevent double recovery the amount of welfare payments received and retained should be deducted from the amount awarded for past wage loss in relation to the period when the welfare payments were being received. But it is important to understand that there is a principled reason for making that deduction. It is made in order to prevent what the majority considered to be improper double recovery. If there is to be no double recovery, the principle could not apply. Mr. Justice Esson, for himself and Mr. Justice Cumming, made that clear, at para. 166, where he said:

In many, perhaps, most, cases where plaintiffs have been in receipt of welfare payments prior to trial, no question of double recovery will arise because, as in *Boarelli* [supra], the plaintiff will have made an assignment to the government body. So it is not the receipt of welfare during the past wage loss period that brings into operation the principle of avoidance of double recovery. Rather, it is the retention of the welfare amount and the intention to continue to retain the welfare amount, notwithstanding an award for past wage loss, which brings the principle of avoidance of double recovery into operation.

[48] According to both *M.(M.)* and *Jones v. Trudel*, therefore, Madam Justice Levine's decision to deduct social assistance benefits was unimpeachable, since M.B. has made it clear through her counsel that, if the payments are not deducted, she intends to retain them.

(5) Would Retention of Benefits Result in Double Recovery?

[49] Before addressing the question of whether receipt of social assistance benefits by M.B. falls within one of the exceptions to the rule against double recovery, I must first address the question of whether the receipt of such benefits would result in double recovery. Unless the social assistance benefits duplicate damages under a particular head of damage in the tort award, it cannot be said that retention of them would result in double recovery. Thus, in this case, unless the social assistance benefits are a form of wage or earnings replacement, then it cannot be said that M.B. has been overcompensated by being paid twice for the same loss. It does not appear that this argument was made in either *M.(M.)* or *Jones*, which apparently proceeded on the assumption that receipt of social assistance payments resulted in double recovery for past wage loss, the only question being whether these payments fell within one of the exceptions to the rule against double recovery.

[50] As earlier noted, the English Court of Appeal in *Lincoln*, and the House of Lords in *Hodgson v. Trapp*, regarded the receipt of social assistance benefits in addition to a tort award as a form of double recovery which could not be justified. This view was shared by the U.K. Parliament which subsequently enacted legislation to deal directly with this issue. But the legislation in England bears no resemblance to that in place in British Columbia pursuant to which the payments to M.B. were made. With due respect to the views of Lord Bridge in

Hodgson to the contrary, I consider it essential to have regard to the nature and purpose of the legislation under which these benefits were paid in determining whether the issue of double recovery arises.

[51] Of the approximately \$122,000 in social assistance payments made to M.B. prior to trial, approximately \$100,000 was paid pursuant to the Guaranteed Available Income For Need Act, R.S.B.C. 1979, c. 158, (the "GAIN Act") and Regulations thereto. The balance was paid under the B.C. Benefits (Income Assistance) Act and the Income Assistance Regulation, B.C. Reg. 75/97. The latter Act, which came into effect on July 30, 1996, was considered by Mr. Justice Donald in M.(M.).

[52] In general terms, the purpose of the GAIN Act was to provide income assistance to those in need. "Income assistance" was defined in s. 1 to mean:

(a) financial assistance; . . . or (f) generally any other form of aid

that is necessary for the purpose of relieving poverty, neglect or suffering; . . .

[53] In addition to financial assistance, the Act also provided for other kinds of assistance for individuals in need, including health care, day care, and homemaker services, and retraining, rehabilitation and other employment-enhancement services.

[54] The GAIN Act specifically provided for the assignment of maintenance rights to the Crown by individuals in receipt of social assistance. That was the only form of assignment of rights referred to in the Act. The only provision in the Act for recovery of "overpayment[s]" of benefits related to situations involving non-disclosure, fraud, error or other causes whereby an individual received benefits to which he was not entitled. There was no provision in the Act for repayment of benefits provided to individuals who subsequently recovered damages in tort.

[55] Section 26(2) of the Act provided that the Lieutenant Governor in Council may make regulations, including regulations:

(c) defining individuals or classes of individuals who qualify for classes of income assistance or social services; (d) prescribing rules for eligibility of individuals or classes of individuals for income assistance or social services; (e) prescribing rules for determining the rate or amount of income assistance and social services;

[56] The Regulations enacted pursuant to s. 26 of the Act (B.C. Reg. 479/76, in effect as of 1976) provided, amongst other things, that "'Benefits' mean income assistance or social services provided under the Act and these regulations." The Regulations defined "earned" and "unearned" income which included both moneys and other benefits. Section 8 of the Regulations provided for circumstances in which "there is no eligibility for income assistance", most of which were related to the applicant's level of income. Section 10 of the Regulations set forth the basis for entitlement to benefits under the Act:

10. Within the limits of the Act and these regulations, an individual eligible for income assistance shall be entitled to receive for himself or herself, and any dependants, income assistance not exceeding the difference between the prescribed amount of benefits set in Schedule A of these regulations and the amount of any nonexempt income available to the applicant and any dependants as prescribed in Schedule B of these regulations.

Schedule A set out basic income assistance rates.

- [57] The Regulations went on to provide for other benefits and services available to applicants including: "provision for educational or rehabilitation services"; "burial or cremation of deceased individuals"; "provisions for individuals requiring special care"; "special services to children"; "homemaker-housekeeper services"; "day care services", "healthcare services"; and "pharmacare".
- [58] In my view, there is nothing in the GAIN Act or Regulations which supports the proposition that social assistance benefits were a form of wage replacement or were intended to be compensatory. The benefits provided took the form of both money and services. The essential qualification for obtaining benefits was need. "Income assistance" was defined as meaning assistance through money and services "that is necessary for the purpose of relieving poverty, neglect or suffering." Past employment was not a requirement for benefits and some who received benefits, including persons with physical and mental disabilities, were permanently unemployable. The benefits were not stated to be a form of wage replacement but simply "income assistance".
- [59] To the extent that the Legislature turned its mind to ensuring that recipients were not overpaid, it did so in limited circumstances. If overpayment occurred because of fraud, error or other cause going to the initial entitlement to benefits, then benefits must be repaid. If a person had a right to maintenance payments, then the Crown could seek an assignment of those benefits to ensure that the qualifying recipient was paid, but not overpaid.
- [60] Does an analysis of the B.C. Benefits (Income Assistance) Act or Regulations lead to a different conclusion? In my view, it does not. The two pieces of legislation are similar in purpose and intent, although the latter Act may be viewed as placing more emphasis on programs leading to self-sufficiency than the former. A similar conclusion was reached by Madam Justice Baker in *Grace v. British Columbia (Lieutenant-Governor in Council)*, [2000] B.C.J. No. 1201 (B.C.S.C.) (Q.L.), as reflected by the following passages at paras. 80 and 82 of that decision:

I do not agree that the intent of the B.C. Benefits (Income Assistance) Act is fundamentally different from the intent of its predecessor [the GAIN Act]. . . . The present (Income Assistance) Act may place more emphasis on the relief of poverty through assisting individuals to become self-sufficient, but the purpose of the legislation remains the same - the provision of income support and social services to residents of British Columbia who are in need and the relief of poverty, neglect and suffering in a financially accountable and administratively efficient manner within the limits of the budget set for the Ministry from time to time.

- [61] Mr. Justice Donald reviewed the provisions of the B.C. Benefits (Income Assistance) Act in *M. (M.)*. I do not find it useful to repeat his analysis in that regard. In essence, the range of benefits provided under the B.C. Benefits (Income Assistance) Act to individuals and families include the same types of benefits provided under the GAIN Act and Regulations.
- [62] Mr. Justice Donald's conclusions with respect to the nature and purpose of the B.C. Benefits (Income Assistance) Act are set forth at para. 45 of these reasons. In coming to those conclusions, he was considering the receipt of these benefits within the context of the charitable gifts exception to the rule against double recovery. While I am considering a different question, namely, whether the receipt of these benefits results in double recovery, I agree with his conclusions with respect to the nature and purpose of the Act.
- [63] In my view, a reasonable conclusion one can draw from Mr. Justice Donald's analysis in *M. (M.)*, and from the Acts and Regulations pursuant to which these benefits were paid, is that social assistance benefits do not give rise to double recovery because they are not in the nature of wage replacement. Entitlement to the benefits payable under either the GAIN Act or the B.C. Benefits (Income Assistance) Act is in no way related to, or dependant upon, the claimant having suffered a loss caused by a tort. Payment of social assistance benefits is not synonymous with, or even roughly correlative to, payments for past wage loss. To view them in that way is simply to impose a tort-damages analysis on payments which were not designed to, and do not, duplicate payments by tortfeasors to victims of torts.
- [64] Applicants for social assistance benefits may well be victims of torts and their need may be related to the fact that a tort has been committed against them. But the Acts pursuant to which these benefits were paid do not purport to deal with, or contemplate, repayment of benefits from the proceeds of tort awards. Nor do they provide for an assignment of any portion of a tort award for damages. In that regard, it is interesting to note that the B.C. Benefits Manual relating to the B.C. Benefits (Income Assistance) Act, provides (under the heading "Policy") that "Assignment or repayment agreements are NOT to be completed for recipients pending ICBC settlements." No reason for this policy is provided, nor were counsel able to assist in that regard.
- [65] If the Legislature had intended to do away with a tort victim's rights to collateral benefits, it could readily have done so in a variety of ways. The issue of double recovery in tort has been around for a long time. The Legislature must be taken to be aware of the issue. Decisions such as *Parry v. Cleaver*, *Boarelli* and *Cunningham* have emphasized that, if the retention of benefits in addition to damage awards gives rise to a significant problem, the Legislature is in the best position to weigh the competing social interests and intervene. Providing rights of subrogation to the payor, an assignment of benefits by a payee, or the imposition of a trust in favour of the payor of benefits provided to the payee are possible alternatives for dealing with this issue if legislation is considered appropriate.

- [66] In the result, I am not persuaded that the benefits received by M.B. under either the GAIN Act or the B.C. Benefits (Income Assistance) Act duplicate the damage award she received for past loss of earning capacity. When one looks at the nature and purpose of these statutes, it is apparent that the benefits paid pursuant to them constitute income assistance, but not wage replacement. They were paid to her for the same reason they are paid to any recipient, "for the purpose of relieving poverty, neglect or suffering." They were payable as a matter of statutory entitlement independent of any right she may have had to recover damages for loss of income earning capacity arising from tort.
- [67] I would add that, even if the social assistance benefits M.B. received could be viewed as a form of wage replacement, difficult questions would arise as to the value of those benefits and the apportionment of their deductibility between tortfeasors (in this case, M.B.'s father and her foster father). Given the conclusion I have reached that these benefits are not properly viewed as wage replacement, it is not necessary for me to examine those questions.
- [68] Before leaving this issue, however, I would note that no one has suggested that the value of the social assistance benefits received by M.B. should be set off against any head of damage other than that for past wage loss, or that there should be an overall set-off of the benefits she received against the total amount of damages awarded. In that regard, I note the following comments made by the Ontario Law Reform Commission in its Report on Compensation For Personal Injuries and Death (Toronto: Ministry of the Attorney General, 1987) at pp. 190-1:

Before proceeding to our reform proposals, one important point should be clarified. We believe that the current no-deduction rule can be criticized only insofar as it allows for double recovery with respect to the same pecuniary loss. In our view, a collateral benefit, whether in the nature of insurance or a benevolent payment, that is not clearly duplicative of an item of damage or loss claimed by the injured person from the wrongdoer, cannot be said to constitute double recovery. A non-indemnity accident benefit that pays a specified sum upon proof of the event of an accident, but without proof of loss, cannot be regarded as duplicating recovery for a loss. Similarly, a gift to an injured person from a relative of a sum of money, not designated to relieve a particular loss, would not be in pari materia with any specific pecuniary claim by the injured person and, accordingly, in our view, cannot be considered, in theory or in fact, double recovery. [Emphasis added.]

- [69] Since I have concluded that the social assistance benefits received by M.B. do not represent wage replacement, it cannot be said that M.B. obtained double recovery. On that basis I would affirm the award of \$50,000 for past loss of earning capacity, without deductibility of the social assistance benefits received by her prior to trial.

- [70] I note here that this result is not affected by the recent decision of the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9. At para. 44 of that decision, the Court specifically declined to consider "the issue of whether social assistance benefits must be disregarded as 'collateral benefits'" on the basis that the question in that case was moot.
- [71] In the event I am in error in finding that the receipt of social assistance benefits by M.B. did not result in her obtaining double recovery under her claim for past loss of earning capacity, I propose to deal with the other submissions before the Court. These submissions are founded on the assumption that double recovery would result if M.B. were to retain the social assistance benefits and the full amount of her tort damages for past loss of earning capacity.
- (6) Applicability of the "Charitable Gifts" Exception
- [72] The nature of this exception to the rule against double recovery and the principal authorities in relation to it are discussed at paras. 26-48, *supra*.
- [73] The Boarelli decision is clear authority for the proposition that social assistance benefits are not deductible from an award of damages on the basis of the "charitable gifts" exception to the rule against double recovery. In *M.(M.)*, however, a majority of this Court, Mr. Justice Donald dissenting, found that Boarelli had been overruled in its entirety by the majority decision in *Ratych*.
- [74] As I stated at para. 36 of these reasons, I am unable to find anything in the *Ratych* decision which purports to overrule Boarelli insofar as that decision discusses the deductibility of welfare benefits. The criticism of Boarelli by Madam Justice McLachlin for the majority in *Ratych*, was that, despite the fact that the only issue before the Court of Appeal in Boarelli was the deductibility of welfare benefits, "the Court took it upon itself to pronounce on a wide variety of other benefits", and took a broad non-deductibility approach to those benefits. While the majority in *Ratych* disapproved of this broad-based approach to the deductibility of collateral benefits, it did not purport to pronounce on that aspect of the Boarelli judgment dealing with the deductibility of welfare benefits. It neither approved, nor disapproved, the deductibility of those benefits. Rather, Madam Justice McLachlin made a point of stating, at p. 983 of the *Ratych* decision, that her comments on the deductibility of wage benefits "should not be taken as extending to types of collateral benefits other than lost earnings, such as insurance paid for by the plaintiff and gratuitous payments made by third parties." She specifically left those matters, which were not before the court, for another day.
- [75] Certainly, there is nothing in the *Cunningham* decision which comments adversely on the Boarelli decision. On the contrary, Boarelli was cited by Mr. Justice Cory as an application of the *Bradburn* decision with respect to the private insurance exception to the rule against double recovery.

- [76] In addition to finding that Boarelli had been overruled by the Supreme Court of Canada, the majority in M.(M.) rejected the submission that social assistance benefits fell within the charitable gifts exception to the rule against double recovery. They did so for two reasons. First, the exception, as described by Madam Justice McLachlin in *Cunningham*, was framed as being in relation to charitable gifts made by "people", that is, individuals. The objection to deductibility in *Cunningham* was said to be based on the concern that individuals may be deterred from making such gifts if they were aware that they would be deducted from an award of damages, and thereby enure to the benefit of the tortfeasor. Secondly, the concern was expressed that there may be difficulties in assessing the value of charitable gifts such that it was not worth the effort to deduct them. The majority in M.(M.) found that neither of these justifications for non-deductibility applied to social assistance benefits provided by the state.
- [77] As earlier stated, I agree with Mr. Justice Donald in M.(M.) that the nature and purpose of social assistance benefits are fundamentally charitable in that they are designed to provide assistance to those in need, however that need arises. In the case of social assistance benefits, however, the source of benevolence is not individuals, but the state. The state, in turn, funds this benevolence through the tax-paying public.
- [78] It is true that the provision of social assistance benefits to victims of torts differs from the provision of a basket of groceries by a neighbour, or from the provision of disaster relief funds, in that the victim has no legal entitlement to the groceries or to moneys from the fund, whereas the victim of a tort may be entitled to social assistance if the financial and other legislative criteria are met. (As Mackenzie J.A. observes in his reasons for judgment, the concept of entitlement is reinforced by reference to the Universal Declaration of Human Rights, U.N. Doc. A/810 (1948) and the International Covenant on Economic, Social and Cultural Rights 1966, U.N. Doc. A/6316, Articles 9 and 11.) I note, however, that the entitlement to social assistance benefits is founded primarily on poverty, or need, the same foundation as for other charitable gifts. In that regard, I would reiterate the following passage from the judgment of Mr. Justice Donald in M.(M.), in which he discusses the nature of the provision of social assistance benefits under the B.C. Benefits (Income Assistance) Act (at para. 85):

The [social assistance] scheme is society's collective response to the needs of the poor, a task once undertaken by religious institutions but now thought to be more effectively discharged by a public agency with a stable funding base provided by all taxpayers. The scheme arises from the notion that we are our brothers' keepers and that we must show compassion for the poor. In that sense the scheme is undoubtedly charitable in nature and clearly falls within the recognized exception in *Boarelli*.

- [79] I recognize that the aspect of entitlement to these benefits distinguishes them from traditional concepts of charity to the extent that they cannot be said to fall directly within the charitable gifts exception to the rule against double recovery. In my view, however, they are sufficiently analogous to charity in all other respects that they can be reasonably brought under the umbrella of this exception.
- [80] In answer to the view of the majority in M.(M.) that, unlike valuing other charitable gifts, valuing social assistance benefits does not present a problem, I agree with Mr. Justice Donald that social assistance benefits are myriad in form and that, if the value of all benefits were to be taken into account and deducted from a tort award, the task would be daunting.
- [81] In response to the suggestion that this problem could be met by deducting only the moneys actually paid, rather than the value of the services provided, I note that isolating the payments which were solely for the benefit of the victim of the tort could be time-consuming in all cases except those where the recipient had no dependants throughout the relevant period, such that it could be said that the benefits were provided for that person and that person alone. In this case, for example, M.B. was single for part of the payment period, had one child for part of the period, had two children for part of the period, and was living with another individual (also a social assistance recipient) for part of the period. The only evidence before the Court of the amounts she received are total figures received during a particular period. They are not broken down according to her living arrangements at any point in time. In that respect, valuing these benefits may present even greater difficulties than valuing other charitable gifts.
- [82] In summary, I do not agree with the majority in M.(M.) that social assistance benefits cannot be brought within the charitable gifts exception to the rule against double recovery. The exception is expanded somewhat in so doing, but in my view, the principles underlying the exception justify this expansion.
- [83] In coming to this conclusion, I concur with Lord Bridge in Hodgson that public policy weighs heavily in the determination of whether benefits, such as the social assistance benefits provided in this case, should be deducted from tort awards in order to avoid double recovery. In that regard, the Legislature has far more resources available to it to gather in and weigh the information necessary to make such decisions than does the judiciary. Even with the resources available to it, the Ontario Law Reform Commission did not feel it had the empirical evidence necessary to make a recommendation with respect to this issue.
- [84] Similarly, in its wide-ranging report on the deductibility of collateral benefits in England (excepting social assistance benefits which had already been dealt with by legislation) the English Law Reform Commission found that there was not sufficient consensus amongst the many groups consulted with respect to any of its proposed options for reform to justify recommendations for further legislative changes. (See Law Commission, Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits, Report No. 262 (November 1999).)

[85] The only community which seems relatively united in its position with respect to the deductibility of collateral benefits, including social assistance benefits, is the academic community. It favours deductibility of all collateral benefits on the basis that any form of overcompensation or double recovery cannot be justified in relation to the fundamental goal of damages which is to provide the victim with full compensation, but no more.

[86] I would add, however, that there are many who believe that full compensation for damages suffered by victims of torts has been, and continues to be, unattainable under our present system. This view was voiced by Peter Andrews, Q.C. in his submission to the English Law Commission that all collateral benefits should be ignored in the assessment of damages for tort. He expressed his views as follows (at p. 133, Law Com. Report):

. . . in many cases of serious personal injury, the plaintiff does not receive truly compensatory damages. He is not placed in the same position as if uninjured. It then follows that there should be no general principle debarring him from retaining "accident" moneys whatever the source. There will be no double recovery because tort damages are only one of the layers of protection which society should provide to those who are disabled. Different members of society will accumulate different levels of recompense for similar injuries depending on a variety of factors, including but not limited to charity donations, personal insurance, the quality of the employment contract, the competence of the instructed lawyers, the idiosyncrasies of the determining judge, and the chance of whether the accident is susceptible to tortious recovery.

Although this point of view was regarded by the Law Commissioners as somewhat of "a counsel of despair", it was recognized as raising a valid concern about whether full compensation for the victims of tort is ever achieved in practice.

[87] In the United States for many years, the general rule was that there should be no deduction for collateral benefits, no matter what the source. This position was influenced, in large part, by the fact that it was well known that lawyers' fees were payable from damage awards, with the result that the amount received by the victim of a tort would never be fully compensatory. (I have little doubt that the same pertains in Canada.) The movement away from non-deductibility in some states in later years has stemmed largely from the astronomical size of jury damage awards, a problem which has not reached a similar magnitude in Canada to date.

[88] In British Columbia, based on the legislation pursuant to which these benefits were paid, I am satisfied that social assistance benefits, while differing in some respects from traditional examples of charitable gifts, are sufficiently analogous to be brought within the charitable gifts exception to the rule against double recovery. I would, therefore, overrule the prior decisions of this Court in *M.(M.)* and *Jones* with respect to this issue.

(7) The Crown as Tortfeasor and Payor of Benefits

- [89] I will now deal briefly with the Crown's submission that since it is both the tortfeasor and the payor of social assistance in this case, it should obtain the benefit of deductibility of social assistance payments even where other tortfeasors may not. The only authority cited in support of that proposition is a passage from Fleming, *The Law of Torts*, 9th ed. (North Ryde, NSW: LBC Information Services, 1998), pp. 280-81, where the author states that the argument in favour of deductibility is strongest in this situation since there is no question of the tortfeasor unjustly benefitting from third party benevolence.
- [90] The simple answer to this submission is the fact that the Crown is both the tortfeasor and the payor of benefits is of no consequence unless the payments made constitute double recovery. As stated earlier in these reasons, I am satisfied that the provision of social assistance benefits in addition to an award of damages in tort does not result in double recovery.
- [91] Alternatively, the fact that the Crown is the payor of the benefits does not change the essential nature of these benefits as being analogous to public benevolence and, therefore, non-deductible on that basis. Finally, this submission ignores the unique position enjoyed by the Crown in terms of its ability to affect legislative change. In the event that retention of social assistance benefits is perceived to result in overcompensation of the victim which is not justified as an exception to the rule against double recovery, the Crown is the one tortfeasor who is well placed to affect change.
- [92] I would, therefore, reject the Crown's submission that its status as tortfeasor and payor of social assistance benefits entitles it to a deduction of these benefits from the award of damages.
- (8) Applicability of the Private Insurance Exception
- [93] Since I have found that the social assistance benefits paid to M.B. are not deductible because they do not result in double recovery, or, alternatively, because these benefits can be brought within an expanded charitable gifts exception to the rule against double recovery, it is not necessary for me to address the question of whether the non-deductibility of these benefits can also be justified under the private insurance exception to the double recovery rule. Suffice it to say that I find the case for non-deductibility more convincing when framed in the context of the charitable gifts exception to the double recovery rule than when framed in the context of the private insurance exception. Although the *Cunningham* decision has expanded the scope of the private insurance exception beyond the limits set by *Ratych*, I would prefer to leave the question of whether those limits should be further extended to another day.
- (9) Summary with Respect to Deductibility of Benefits
- [94] In its judgment issued March 27, 2001, this Court allowed the Crown's appeal to the extent of reducing the overall award for past loss of earning capacity to \$50,000 from a gross award of approximately \$132,000, without consideration of issues of deductibility. I have concluded

that the amount of that award should not be reduced by deducting therefrom social assistance benefits received by M.B. pending trial. I would, therefore, dismiss the Crown's application to have those benefits deducted and direct that judgment for past loss of earning capacity be entered in the amount of \$50,000 plus court order interest.

[95] The question then becomes one of determining the amount of court order interest payable under this head of damage.

B. Calculation of Court Order Interest

[96] As indicated at para. 10 of these reasons, Madam Justice Levine's order reflects the agreement of counsel at trial that interest should be calculated on the past loss of earning capacity by treating the entire loss as if it had arisen on the day of the tort. I agree with Mr. Justice Mackenzie that interest on the award for past loss should be calculated as special damages in accordance with s. 1(2) of the Court Order Interest Act, R.S.B.C. 1996, c. 79, by treating the award as a stream of income received evenly over the period of time starting six months after the cause of action arose (January 1, 1977) and ending at the date of judgment as proposed by the Crown. I would allow the appeal with respect to this issue.

CONCLUSION

[97] I would dismiss the Crown's application with respect to the deductibility of social assistance benefits. I would allow the Crown's appeal with respect to the method of calculating interest on the award for past loss.

[98] Subject to further submissions of the parties, I would grant M.B. her costs of this aspect of the appeal since, in my view, she has been successful on the primary issue on this appeal and since both of these issues are of general importance and in the nature of a test case.

"The Honourable Madam Justice Prowse"

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[99] I have had the advantage of reading the draft reasons for judgment of Madam Justice Prowse and I agree with her conclusion that the social insurance benefits received by the plaintiff should not be deducted from the award of damages for loss of earning capacity. In my respectful view, the majority judgment of this court in *M.(M.) v. F.(R.)* (1997), 52 B.C.L.R.(3d) 127 (C.A.), was based on a misconception of the application of *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, and should not be followed.

[100] Madam Justice Prowse has extensively canvassed the relevant authorities and it is only necessary for me to refer to them briefly in the course of these concurring reasons.

[101] There is one proposition that is uncontested in this otherwise controversial area of the law, namely that there is no deductibility if there is a right of subrogation. A benefit paid to a plaintiff is not deductible where the plaintiff is under an obligation to repay the benefit out of the tort award. This proposition is the narrow ratio of *Boarelli v. Flannigan* (1973), 36

D.L.R. (3d) 4, at 6 (Ont. C.A.) and it was treated as axiomatic in *Ratych v. Bloomer and Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. It was also the ratio of the majority judgment in *Jones v. Trudel* (2000), 74 B.C.L.R.(3d) 263 (C.A.).

- [102] No right of subrogation is claimed in this case. Section 12 of the BC Benefits (Income Assistance) Act, R.S.B.C. c. 27, authorizes the government to make subrogation agreements with social welfare recipients but these discretionary provisions have not been pursued.
- [103] Boarelli concluded, obiter, that in the absence of subrogation there was no deductibility because of a broad principle of non-deductibility going back to *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, and affirmed in *Parry v. Cleaver*, [1970] A.C. 1. Ratych rejected the broad Boarelli principle of non-deductibility, but the deduction of social welfare benefits was not addressed. The case involved a claim for loss of earnings due to injury sustained in a motor vehicle accident where the plaintiff, a police officer, had been paid his full salary throughout from sick leave benefits to which he was entitled under the terms of his employment. McLachlin J. (now C.J.C.) for the majority framed the essential question as; "how far is it right that a person should be compensated for the same loss from more than one source? (My emphasis.)
- [104] Social welfare benefits are "income assistance" under the Act. Income assistance is defined as "a support and shelter allowance". Support and shelter connote need. They are independent of any loss. The trial judge assessed the loss of earning capacity caused by the assaults of the foster father and the biological father together at \$10,000, after deducting income assistance of \$122,320.96. This Court substituted \$50,000 before income assistance reflecting a division between the separate torts of the foster father and the biological father. That loss is spread over the period of 20 years from 1979 when the plaintiff reached age 18 to the trial date in 1999. The income assistance of \$122,320.96 was all received between September 1991 and November 1998. The result of the trial judge's approach is that income assistance received in the 1991 to 1998 period is deducted, in part, from compensation for loss of earning capacity in the 1979 to 1990 period.
- [105] I do not think that there is any authority for the proposition that social assistance benefits received in one period can be deducted from damages for loss of earnings suffered in a different period. Clearly it cannot be said to be compensation for the same loss. Factually, this case illustrates the issues of allocation that will arise from deductibility. Apart from the timing difficulties, there is the further problem noted by Prowse J.A. of dividing the benefits between the damages for the tort of the biological father, a claim that has been settled, and the tort of the foster father at issue here. I do not think there is any difference in principle between tortfeasors in terms of deductibility when each tort has contributed to the earnings loss.
- [106] While these complications are specific to the present case, they illustrate the difficulties facing deductibility of social assistance benefits more generally. They underline the general proposition that damages and social assistance reflect different compensation objectives

and there is no direct connection between them. In my opinion, they are not compensation for the same loss as the issue was framed in *Ratych* and consequently they do not pass the threshold requirement of double compensation. In my respectful view, the majority opinion in *M.(M.)* assumed double compensation and in that respect misapplied *Ratych*.

[107] If there is no double compensation for the same loss, the issues that have engaged the courts since *Bradburn* in defining the insurance indemnity and charitable benefits exceptions do not arise. This is not a case of indemnity analogous to insurance because the benefits do not indemnify against the same loss caused by the tort. Nor are the benefits charity, the other classic head of non-deductibility going back to *Bradburn*. In one sense, social assistance benefits are analogous to charity because they involve the relief of poverty. But the analogy ends there. Social assistance benefits are not gratuitous; they are paid by statutory obligation. The statute reflects a broader sense of social obligation than simple charity. That obligation is expressed in Article 25(1) of the Universal Declaration of Human Rights, U.N. Doc. A/810 (1948), in these terms:

ARTICLE 25(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, widowhood, old age or other lack of livelihood in circumstances beyond his control. [108] The Universal Declaration is of course only a declaration, without the legal force of an international convention or treaty. Canada has acceded to the International Covenant on Economic, Social and Cultural Rights 1966, U.N. Doc. A/6316 (1966), and Articles 9 and 11 of that Covenant may have converted the rights declared in Article 25 into obligations. The relationship and status in Canada of the Declaration and the Covenant are discussed by Dickson C.J. in *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 350-2. Consistent with the Declaration and the Covenant, the BC Benefits Act can be taken as a recognition by the Legislature of a general obligation to relieve poverty and the right of those in need to receive adequate support for their health and well being.

[109] In summary I do not think that the *Bradburn* categories of collateral benefits are at issue in this case because it cannot be said that the social assistance benefits were paid for the same loss as the tort. They are not an indemnity against a specific loss of income. Nor are they charity, because of the statutory right of the recipient to payment and the implied general obligation. But the threshold test, affirmed in *Ratych*, is that a deductible benefit must be paid for the same loss. Social assistance benefits are identified with need: they are not an indemnity for the loss claimed in the action. In my view, the threshold test has not been met and the benefits paid to the plaintiff are not deductible.

[110] For these reasons I agree with the conclusion of Madam Justice Prowse and I now turn to the issue of court order interest raised by the award for past loss of earning capacity.

The calculation of court order interest

- [111] The plaintiff submits that she should be awarded court order interest on the full amount of the award for loss of earning capacity from the date six months after the date the cause of action arose in 1976. Counsel has calculated this amount of interest on the award of \$50,000 at approximately \$100,000.
- [112] Counsel are agreed that the award is "special damages" for the purpose of calculating interest pursuant to s. 1(2) of the Court Order Interest Act, R.S.B.C. 1996, c. 79. That provision is:
1. (2) Despite subsection (1) if the order consists in whole or part of special damages, the interest on those damages must be calculated from the end of each 6 month period in which the special damages were incurred to the date of the order on the total of the special damages incurred
- (a) in the 6 month period immediately following the date on which the cause of action arose, and (b) in any subsequent 6 month period.
- [113] Counsel for the Crown submits that the award should be treated as a stream of income received evenly over the period of time starting six months after the cause of action arose and ending at the date of judgment. Interest is calculated in six-month increments. Calculation on this basis would result in an award of interest of approximately \$40,000. The difference between the two approaches is therefore about \$60,000, more than the net amount of the award.
- [114] The plaintiff submits that the award here is for the loss of earning capacity, a capital asset, rather than a loss of a stream of periodic wage payments. She contends that it is therefore properly classified as a loss entirely incurred "in the 6 month period immediately following the date on which the cause of action arose" and interest is calculated on the full amount under s. 1(2)(a) from the end of the first 6 months. The capital asset approach was explained in *Pallos v. I.C.B.C.* (1995), 100 B.C.L.R.(2d) 260 (C.A.).
- [115] The approach advocated by the Crown was adopted by Spencer J. in *Baart v. Kumar* (1983), 45 B.C.L.R. 233 (B.C.S.C.) and approved by this Court on appeal (1985), 66 B.C.L.R. 1 (C.A.). Seaton J.A. held that although the British Columbia courts have traditionally characterized past loss of income as general damages, the term "special damages" in the Court Order Interest Act was meant to single out damages incurred over the period before trial, and should be interpreted to cover lost earnings. (at p.16)
- [116] In my view, the method applied in *Baart v. Kumar* should be generally applied, irrespective of whether the claim is assessed as past loss earnings or past loss of earning capacity. Spencer J. concluded that even though the claim was pleaded as lost past earning capacity it should be allocated to six month increments and interest calculated in accordance with s. 1(2) of the Act. His judgment was upheld by Seaton J.A. in this Court, who stated (at p. 16): "What the plaintiff seeks is full interest on the full amount for the full time. Clearly she is

not entitled to that." Taggart J.A. and Lambert J.A. agreed in concurring reasons. Lambert J.A. would also have approved the alternative of interest paid on the full amount over the whole period, but at a reduced rate of interest. Neither the Crown nor the plaintiff advocated a reduced rate in the present case.

- [117] In *Shaw v. Mourad*, [1995] B.C.J. No. 228 Goldie J.A., speaking for this Court, declined to interfere with a trial judgment that calculated interest on a past wage loss over a two year period on the full amount at the lowest court order interest rate during the period. He characterized the result as practical in the circumstances, a relatively short term. Similarly, the period of past loss of housekeeping capacity considered by Edwards J. in *Kitnikone v. Watts et al*, 2001 BCSC 450, was relatively short and the inflation element was not significant.
- [118] Here the period involved is 20 years, commencing in 1979. The significance of inflation over this period is apparent if we compare the inflationary history of the rough upper limit for non-pecuniary loss since it was determined at \$100,000 in 1978 by the trilogy that included *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.). The plaintiff's cause of action here arose two years earlier. Over the intervening years the inflation adjustment of the rough upper limit has brought the original figure up to \$250,000 in inflation adjusted "current dollars". The plaintiff has been awarded \$50,000 in current dollars as at the trial date, the equivalent of \$20,000 in uninflated dollars at the date the cause of action arose. Thus the \$50,000 award includes compensation for inflation between those dates. If the plaintiff were to be awarded full court order interest between the two dates, which is also intended to compensate for inflation, she would receive double compensation for inflation.
- [119] The rates of court order interest include compensation for inflation. They are presently set by regulation at two per cent below bankers' prime interest rates and historically the rate has fluctuated in a roughly similar relationship to market interest rates. This contrasts with the discount rate, prescribed of two and one-half percent pursuant to s. 51 of the Law and Equity Act, R.S.B.C. 1996, c. 253, used to calculate the present value of a loss of future earnings. The discount rate has not varied since it was first prescribed in 1981. It is intended to be a "real" or non-inflationary rate of interest. The court order interest rate linked to market rates is higher. It is intended to compensate for both the real and inflation components of market interest.
- [120] In my respectful view, the approach approved in *Baart v. Kumar* is sound whether the past loss is characterized as lost earnings or lost earning capacity. If anything it is to the plaintiff's advantage because it allows the award to be made in current dollars as at the date of trial while allowing some additional compensation for inflation implicit in the court order interest rates on the six month increments.
- [121] I would direct that court order interest should be calculated as proposed by the Crown. I agree with the disposition as to costs proposed by Madam Justice Prowse.

"The Honourable Mr. Justice Mackenzie"

Reasons for Judgment of the Honourable Chief Justice Finch:

- [122] I have had the advantage of reading in draft form the Reasons for Judgment of my colleagues Prowse, Mackenzie, Hall and Smith J.J.A. I expressly agree with Madam Justice Prowse and Mr. Justice Mackenzie that the social security benefits paid to the plaintiff in this case do not give rise to double recovery for loss of income, because those benefits are not in the nature of wage or income replacement. As Mr. Justice Mackenzie says, the two sources of payment reflect different compensation objectives. I respectfully disagree with the majority view in *M.(M.) v. F.(R.)* (1997), 52 B.C.L.R. (3d) 127.
- [123] While that is sufficient to decide the first issue, if that view of the matter is held elsewhere to be in error, I would add that I also agree with Madam Justice Prowse that social security benefits would come within the charitable gifts exception to the rule against double recovery, for the dissenting reasons expressed by Mr. Justice Donald in *M.(M.)*.
- [124] I would dispose of the issues on Court Order Interest as proposed by Mr. Justice Mackenzie and for the reasons given by him.
- [125] Finally, I agree with the disposition of costs as proposed by Madam Justice Prowse.

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [126] I have had the opportunity of reading in draft the Reasons for Judgment of Prowse J.A., Mackenzie J.A. and Smith J.A. In her Reasons, Prowse J.A. has set forth the history of this case. As Prowse J.A. outlines, it was considered appropriate to convene a five-judge panel in order to consider both the deductibility of social assistance payments from an income loss award and the methodology of calculating interest on any such award. I am in agreement with the Reasons of Mackenzie J.A. concerning the methodology by which interest ought to be calculated on any such award. I am in agreement with the Reasons of Smith J.A. The method of allocation of payments he proposes in his Reasons seems to me to be appropriate. Of course, in this type of case, there will always be an evidentiary burden on a defendant to establish that deductible payments have been received by a plaintiff.
- [127] At trial, the parties were agreed that the respondent had, prior to the time of trial, received social assistance, or statutory income assistance payments, from the defendant Province in the amount of approximately \$122,000. The majority of the payments were paid under the Guaranteed Available Income for Need Act, R.S.B.C. 1979, c. 158, (the "GAIN Act"). This statute was replaced in 1996 with the British Columbia Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27. The provisions of both statutes are generally similar. In my view, the respective statutes and their associated regulations are meant to provide income assistance for those who are unable to earn an income adequate to support themselves and their dependants. Such assistance does not, in my opinion, fall under any exception to the

general rule against double compensation.

[128] In the Statement of Claim filed in this action in 1997, the plaintiff respondent pleaded that she had suffered a past loss of income and the loss of an ability to earn income in the future. At para. 276 of her 3 May 2000 Reasons for Judgment, Levine J., (as she then was), accepted the evidence of a psychologist that the psychological injuries that the plaintiff had suffered as a result of the activities of her abusers (natural parent and foster parent), made it difficult for her "to initiate and sustain educational and vocational efforts." At para. 314, the trial judge stated as follows:

There is no question that the sexual assault by J.P. caused the plaintiff loss of earning capacity up to the date of trial.

[129] Although the trial judge did not set out in detail by what methodology she assessed the sum of \$132,000 as compensation for past loss of income, or earning capacity, she must have found the loss proven in that amount because, after deducting the amount of social assistance paid in the sum of \$122,000, the trial judge assessed damages under this head at \$10,000.

[130] The case was appealed to this Court. In its original judgment, handed down 27 March 2001, this Court found that the trial judge had erred in failing to apportion damages between the natural parent and the foster parent in order to reflect the respective amounts of harm caused to the respondent by each parent. The majority found the defendant Province liable for the wrongs committed by the foster parent. Mackenzie J.A. said this at para. 106 of his Reasons:

The trial judge assessed the plaintiff's loss of past opportunity to earn income at \$132,320.96, calculated as the amount of income assistance from the province repayable out of any award, plus \$10,000. The trial judge's award under this head reflects the same error in failing to allocate the loss between the plaintiff's original position as a result of the prior tort and the loss attributable to the foster father's tort. Adjusting for that error I would vary the award to \$50,000, before deduction for income assistance. In my respectful view, the income assistance arrangement is a collateral matter between the plaintiff and the provincial government that should not influence the quantum of the tort award. [131] As noted in the Reasons of Prowse J.A., it became apparent after the delivery of the judgment that it would be necessary to reconsider both the issue of deductibility of social assistance payments and the method of interest calculation on the past loss award.

The Insurance Exception

[132] A leading case in this area of so-called "collateral benefits" is the case of *Bradburn v. Great Western Rail Co.*, [1874 -1880] All E.R. Rep. 195, but the applicable principle was probably extant even earlier. In *Bradburn*, it was held that a plaintiff injured in a railway accident was entitled to receive monies payable under an insurance policy, in addition to any damages he might recover from the defendant. In that case, the plaintiff *Bradburn* had

been awarded £217 by the jury. Bradburn had also received £31 from his insurer, as compensation for the time he was unable to attend to his business. The defendant railroad argued that this latter sum should be deducted from the jury award. That argument was rejected by the Court, Pigott B. observing as follows at p. 197:

I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying by for a rainy day." He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them.

[133] In the case of *Parry v. Cleaver*, [1970] A.C. 1 (H.L.), Lord Reid, giving a majority judgment, referred to the Bradburn case, and then went on to note a similar holding in an earlier case:

I may refer to an old Scottish case, *Forgie v. Henderson* (1818) 1 Murray 410, where the pursuer was assaulted by the defender. During part of his resulting illness he received an allowance from a friendly society, and Lord Chief Commissioner Adam said, at p. 418, in charging the jury:

"I do not think you can deduct the allowance from the society, as that is of the nature of an insurance, and is a return for money paid."

[134] At the time that *Forgie*, supra, was decided, friendly societies were the equivalent of our modern insurers.

The General Rule Against "Double Recovery"

[135] Many of the older cases, including the leading case on the charitable payments exception from deduction, *Redpath v. Belfast and County Down Railway*, [1947] N.I. 167, appear to rely on a causality analysis as the basis of the exception from deduction. In more recent times, the courts appear to have moved away from a strict causality analysis (what the older cases term "causa causans"). Courts now ask whether the payments under consideration are compensatory payments, similar to and directed at the same head of loss as the potential award. They now tend to focus on the question of possible "double recovery." For instance, in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 at 396, Cory J. observed the following concerning the leading principle of recovery of damages in tort cases:

At the outset, it may be well to state once again the principle of recovery in an action for tort. Simply, it is to compensate the injured party as completely as possible for the loss suffered as a result of the negligent action or inaction of the defendant. However, the plaintiff is not entitled to a double recovery for any loss arising from the injury.

[136] That is, of course, not an entirely new principle. An often quoted early authority on the subject may be found in *Livingstone v. The Rawyards Coal Company*, [1880] 5 A.C. 25, a case involving trespass to land. There, Lord Blackburn stated as follows at p. 39:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[137] As my colleague Mackenzie J.A. observes, there can be no question that there will be no deductibility of benefits if there is a right of subrogation relative to those benefits. In addition, there exists the long-established and above-mentioned principle of non-deductibility for benefits received from private insurance or charity.

[138] Another area where benefits will usually be found non-deductible is the pension exception, an exception found to exist in cases like *C.P.R. v. Gill*, (1973), S.C.R. 654. In *Cunningham*, supra, and related cases decided at the same time, the Supreme Court of Canada held that the plaintiffs had contributed to the plans from which they received funds. Therefore, an exception analogous to the private insurance or pension exception was found to exist in favour of those plaintiffs. Pensions are like private insurances in that the person injured has personally paid for them in whole or in part. I would characterize such plans as a sub-species of the insurance exception found in cases like *Bradburn*, supra. Ultimately, however, circumstances such as those outlined above, which require that compensatory payments not be deducted from tort damage awards, are the exception rather than the rule.

Social Assistance Benefits As Deductible: *Ratych v. Bloomer*

[139] In this case, the respondent argues that we should overrule the following conclusions expressed by Esson J.A., speaking for the majority, in the case of *M.(M.) v. F.(R.)* (1999), 52 B.C.L.R. (3d) 127 (C.A.) at pp. 181-82:

The final question is that as to the deductibility of welfare benefits. The Ontario Court of Appeal, in *Boarelli v. Flannigan* (1973), 36 D.L.R. (3d) 4 (Ont. C.A.) held that such benefits are not to be deducted. I agree with the learned trial judge that the reasoning upon which that decision was based was overruled by the Supreme Court of Canada in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 (S.C.C.) and that *Boarelli* should no longer be followed. . . . The majority judgment is that of McLachlin J. The essence of her reasoning is, in my view, to be found in this passage at p. 963-4:

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. 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-accident position. Where pecuniary losses, such as loss of earnings, 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. As Lord Diplock stated in *Browning v. War Office*, [1962] 3 All E.R. 1089, at pp. 1094-95: "A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff." McLachlin J., in her discussion of *Boarelli* at p. 969, referred to it as having "adopted a broad non-deductibility approach". In doing so, the court gave effect to the "moralistic view of tort" which focuses on punishment to the tortfeasor and on the supposed "benefit" to the tortfeasor which results from bringing collateral payments into account. That aspect was emphasised in *Boarelli* as in this passage at p. 8: ...I do not think that the Legislature intended them [welfare payments] to be for the benefit of the wrongdoer I therefore conclude that *Boarelli* was overruled in its entirety by *Ratych v. Bloomer*.

[140] In my opinion, authorities in the English Courts decided over the past several years have generally favoured the deductibility of social assistance payments from awards for loss of income: see *Hodgson v. Trapp*, [1989] 1 A.C. 807 and *Lincoln v. Hayman*, [1982] 2 All E.R. 819 (C.A.). As I interpret the reasoning in those cases, it was held that it would result in overcompensation of a plaintiff if the benefits received were not taken into account.

[141] It was not specifically necessary in the *Ratych* case for the majority to determine whether or not *Boarelli* should be overruled. However, I tend to agree with the view expressed by Esson J.A. in *M.(M.) v. F.(R.)*, *supra*, that the reasoning in the majority judgment would appear to indicate such a result. I note this comment in the Reasons of the majority in *Ratych*, *supra*, at pp. 973-74:

[I]t may be that there is a valid distinction between cases where a person has prudently obtained and paid for personal insurance and cases where the benefits flow from the employer/employee relationship. The law has long recognized that in the first situation an exception should be made to the usual rule against double recovery. The existence of such an exception does not mean it should be extended to situations where personal prudence and deprivation are not demonstrated. In the latter case there is little to be weighed in the balance against the general policy of the law against double compensation. [Emphasis added.]

[142] There is no doubt that the private insurance exception, or an analogous exception such as was found to exist in the disability plans under consideration in *Cunningham*, *supra*, and related cases, are well-recognized exceptions to the rule against double recovery in tort cases. In these types of cases, the plaintiff has paid or given up something in order to receive the benefits. Neither can there be any doubt, however, that the basic rule is against double recovery and that the exceptions are truly exceptions.

[143] While social assistance benefits may be paid in this province to persons who are impoverished for a variety of reasons, it is clear from the legislative scheme that the payments are designed to provide income assistance. In the instant case, the plaintiff

respondent required income assistance over many years because she had suffered psychological injury as a result of abuse and was rendered less capable of obtaining employment and earning income as a result. There is no question but that she received benefits as "income replacement." As I have noted, she claimed in this action that she was, because of the tort, less able to earn income by reasons of her injuries. She claimed for past and future loss of income. The trial judge made awards under those heads of damages.

[144] In my judgment, the social assistance payments the respondent received were a partial replacement of her income loss, or her capacity to earn income. These payments received by her do not fall within the insurance or pension exceptions. Nor in my view, do they have the character of charitable payments. This was not a situation similar to that in *Redpath*, *supra*, where a subscription was organized for the victims of a misfortune. Rather, it is a situation where payments were made to the respondent pursuant to a statutory income assistance scheme. I am in agreement with *Mackenzie J.A.* that these payments should not be categorized as within the charitable payments exception. Therefore, in my judgment, the trial judge did not err in making the deduction she did from the past loss of income award. It follows that I would not accede to the respondent's argument that we ought to overrule *M.(M.) v. F.(R.)*, referred to *supra*. In my view, that case was correctly decided.

[145] I have not found it necessary to reach any conclusion on the argument advanced on behalf of the appellant that this Court should consider the fact that the Province was both the payer of damages and the payer of income assistance as a factor favouring deductibility. While such an argument may highlight the circumstance that the transactions are not entirely between others (*res inter alios acta*), such an analysis appears to me rather like to the causality analysis found in the early cases, an analysis now less favoured. I prefer to consider the intrinsic nature of the payments, which, I suggest, is a surer test for the question of deductibility or non-deductibility. I would simply leave the argument open for consideration, if necessary, in a future case.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Mr. Justice Smith:

[146] I have had the privilege of reading the reasons for judgment of each of my colleagues in draft form.

[147] I agree with Mr. Justice Mackenzie on the proper method of calculating interest on the award for past loss of income. I agree with him, as well, that income assistance payments are not within the charitable exception for the reason that they are not made gratuitously. Rather, they are a legal entitlement of qualified recipients and are paid as a result of statutory obligation.

[148] Further, I agree with Mr. Justice Mackenzie and with Mr. Justice Hall that income assistance payments do not fall within the private insurance exception. In *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, Cory J., speaking for the majority, founded this exception on the fairness inherent in allowing the plaintiff to keep what he has earned. At para. 82, he said:

I think the exemption for the private policy of insurance should be maintained. It has a long history. It is understood and accepted. There has never been any confusion as to when it should be applied. More importantly it is based on fairness. All who insure themselves for disability benefits are displaying wisdom and forethought in making provision for the continuation of some income in case of disabling injury or illness. The acquisition of the policy has social benefits for those insured, their dependants and indeed their community. It represents forbearance and self-denial on the part of the purchaser of the policy to provide for contingencies. The individual may never make a claim on the policy and the premiums paid may be a total loss. Yet the policy provides security. (my emphasis)

Cory J. acknowledged fairness and justice as the reason for the exception in his dissenting reasons in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, as well, at 950. Income assistance payments do not fit this mould. They involve no element of individual forbearance, self-denial, or forethought by recipients - they are funded by the taxpayers generally and anyone who satisfies the qualifying criteria is entitled to receive them.

[149] Further, I agree with Mr. Justice Hall that *M.(M.) v. F.(R.)* (1997), 52 B.C.L.R. (3d) 127 (C.A.) was correctly decided. In my opinion, the effect of *Ratych v. Bloomer*, *supra*, and of *Cunningham v. Wheeler*, *supra*, is that all collateral payments in the nature of income that have been received by a plaintiff must be taken into account in an award of damages for past loss of income unless they fall within the private insurance or charitable exceptions.

[150] I agree, as well, with Mr. Justice Hall that the plaintiff in this case cannot keep both the income assistance payments and the award for past income loss. While I agree generally with Mr. Justice Hall's reasons, I would like to express my reasons in my own words.

[151] In virtually every claim for past loss of income, the plaintiff will have received and spent the receipts from the collateral source before the tortfeasor is called upon to pay. The question, therefore, is whether the plaintiff has suffered a loss that the defendant is legally obliged to offset. As McLachlin J. (now C.J.C.) said, in her majority judgment in *Ratych v. Bloomer*, at p. 964:

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-accident position. Where pecuniary losses, such as loss of earnings, 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. As Lord Diplock stated in *Browning v. War Office*, [1962] 3 All E.R. 1089, at pp. 1094-95: "A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to

the plaintiff."

[152] Of course, if the collateral payer is entitled to be subrogated to the plaintiff's claim, the collateral payments cannot offset the plaintiff's loss. The right to subrogation is normally created by contract, as in the case of private insurance, or by statute, as in the case of some statutory benefits. Subrogation may also be achieved by the courts through the imposition of a trust upon an award or by a direction to pay in favour of persons in close relationship to the plaintiff who have gratuitously provided necessary services, such as nursing care: see *Ratych v. Bloomer*, supra, at 978-79. As McLachlin J. said at 979, the justification for such court-imposed subrogation:

... may be seen as a moral obligation on the part of the injured plaintiff to repay those who rendered services to him gratuitously, coupled with the desirability of avoiding the injustice which would result from the inability to otherwise compensate the persons who rendered services, given that they had no independent cause of action.

[153] In such cases, the loss caused by the tort has been conditionally absorbed by the collateral payer and restitution of the payer's loss is accomplished derivatively through the plaintiff's claim against the tortfeasor. Thus, it is not the plaintiff's loss at all. If the plaintiff does not recover from the tortfeasor, the collateral payer suffers the loss. If the plaintiff does recover, the payer's loss is recompensed by the tortfeasor.

[154] When subrogation is not a relevant consideration, it must be determined whether the collateral payments were received on account of the plaintiff's loss. To the extent that they were so received, the plaintiff's loss has been recompensed and the tortfeasor cannot be called upon to pay.

[155] The relevant pre-trial damage alleged by the plaintiff in her statement of claim in this case was "a loss of income." Although, the trial judge characterized the claim as one for "loss of earning capacity", it is my view that the effect of her award was to replace a lost income stream. The trial judge implicitly recognized this as the essence of the award when she based it upon statistical evidence of average employment earnings of females resident in British Columbia (see her reasons at [2000] B.C.J. No. 909 (Q.L.), para. 310). Moreover, this view is consistent with fundamental principle. The measure of damages is the plaintiff's actual financial loss, not the theoretical value of an untapped abstract capacity to earn. In my view, the difference in phraseology in respect of pre-trial loss between "loss of income" and "loss of earning capacity" is terminological, not substantive.

[156] Consequently, the award of damages for pre-trial loss of income in this case has converted a past uncertainty into a certainty - but for her tortiously-caused injuries, the plaintiff would have been employed during the pre-trial period and would have earned income from her employment.

- [157] The corollary of this conclusion is that the plaintiff would not have received income assistance benefits while she was working. It is implicit in the deduction of the income assistance payments by the trial judge that, as a matter of fact, the plaintiff would not have been eligible to receive them while she was gainfully employed. It follows that the income assistance payments that the plaintiff received had the effect of partially replacing her lost employment income.
- [158] Thus, on the application of fundamental principles, the result is that the plaintiff's past loss of income was offset pro tanto by receipt of the income assistance payments and, to that extent, that she has suffered no loss.
- [159] On M.B.'s submission, it does not matter that the effect of the receipt of income assistance payments is to offset pro tanto her loss of income. She contended that the nature and purpose of the income assistance payments are determinative. She submitted that income assistance payments are different in kind from employment income - that they are a social allowance based on need and are not intended as an income-replacement scheme and, therefore, that they ought not to be applied against her loss of income. I cannot agree.
- [160] In *Ratych v. Bloomer*, supra, at 972, McLachlin J. referred to Lord Reid's comment in *Parry v. Cleaver*, [1969] 1 All E.R. 555 (H.L.) at 560 to the effect that wages paid to a person while he is off work do not differ in kind from the wages paid while he is working, with the result that we never reach the question of how we treat sums he never would have received but for the accident. As I understand her reasons, McLachlin J. accepted that proposition when she rejected the argument that the court must assume that a quid pro quo was paid by the plaintiff for the wages received while he was off work and when she reiterated, at 973, that "a plaintiff is obliged to prove his or her loss."
- [161] The comments of both learned jurists were made in the context of a consideration of payments received as a result of an employer-employee relationship, but this relationship is not the critical element of their analyses. Rather, it is the nature of the payments that is important. In both cases the payments were qualitatively equivalent to wages received in consideration for the plaintiff's work. Substituting "income" for "wages" in Lord Reid's dictum, it is my view that to the extent that a plaintiff receives income while he is off work that does not differ in kind from the income that he receives while he is working, he has suffered no loss of income.
- [162] In my opinion, the income assistance payments received by the plaintiff in the pre-trial period did not differ in kind from the employment income that she lost because her injuries rendered her unable to work. Income assistance payments made pursuant to the relevant legislation are and are intended to be a replacement of or a substitution for that part of employment income that would be spent to meet basic needs.
- [163] Section 9 of the Interpretation Act, R.S.B.C. 1996, c. 238, tells us that the title and preamble of a statute are guides to its meaning and objects.

[164] The titles of both the Guaranteed Available Income For Need Act, R.S.B.C. 1979, c. 158 and the B.C. Benefits (Income Assistance) Act, R.S.B.C. 1996, c. 27 speak of "income." The plain and ordinary meaning of "income" in this context is the periodic receipt of money in exchange for one's work or from business or investments: see, e.g., The Concise Oxford English Dictionary, 8th ed. (Oxford: Clarendon Press, 1990) at p. 598. Accordingly, the statutory titles suggest that "income" in this sense is an integral concept in both statutes and, in the case of the GAIN Act, that the income is intended to meet needs.

[165] The GAIN Act has no preamble but the preamble to the B.C. Benefits (Income Assistance) Act reads as follows:

WHEREAS British Columbians are committed to preserving a social safety net that is responsive to changing social and economic circumstances; AND WHEREAS self-sufficiency, self-determination and the opportunity to work are fundamental to the quality of life for British Columbians and their communities; AND WHEREAS individuals, families, communities, business, labour and governments share responsibility for economic security; AND WHEREAS training and support enable British Columbians to develop skills and abilities so that they can participate fully in their communities; AND WHEREAS income support programs should be financially and administratively accountable, effective and well coordinated; THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows: ... (my emphasis)

Thus, the preamble sets out the objects of this statute as the provision of a social safety net, of economic security, and of a training and support structure for those in transition to gainful employment. As well, it refers to the values of self-sufficiency, self-determination, the opportunity to work, and collective responsibility. The means by which the objects are to be attained and the values are to be implemented is a program of "income support." Accordingly, the preamble suggests that the B.C. Benefits (Income Assistance) Act is essentially an income-provision scheme with several subsidiary objects, all to be administered with reference to a range of stated values in which the emphasis is on self-sufficiency and self-determination through work.

[166] The two statutes implement virtually the same legislative scheme, as can be seen from an examination of their provisions. Both statutes exhibit a direct relationship between the income assistance payments provided and income from employment. For example, under the GAIN Act, ss. 10 and 11 speak of encouraging recipients of income assistance to work and to obtain work-related skills and of providing incentives to recipients to obtain employment and to achieve financial independence. As well, s. 18 provides for the termination or reduction of income assistance payments to a recipient who refuses employment, is terminated from employment for misconduct or who leaves voluntarily for other than medical reasons, or who does not make reasonable efforts to obtain employment.

- [167] The B.C. Benefits (Income Assistance) Act contains similar provisions. Section 9 corresponds to s. 18 of the GAIN Act and s. 10 deals with ineligibility of persons who have "failed to accept or pursue income, assets, or other means of support" and who have disposed of property in such a way as to attempt to make themselves appear to be eligible for income assistance.
- [168] In both statutes, the details of the income support program are laid out in the regulations. I find that the regulations in each case are consistent with and confirmatory of my interpretation of the meaning and object of the legislation: see *Hanlon v. Law Society*, [1981] A.C. 124 (H.L.) per Lord Lowry at 193-94, where it is said that resort may be had to subordinate legislation for such an interpretive purpose. In particular, under both sets of regulations, eligibility for income assistance is made dependent upon the financial circumstances of the applicant in terms that illustrate the coupling of income assistance payments to the absence of income from employment, from investments, or from the provision of services. Both declare ineligible persons who have assets exceeding certain values and both provide for eligibility based upon the level of the applicant's calculated net income.
- [169] Interestingly, s. 9(2) of the regulations promulgated pursuant to the B.C. Benefits (Income Assistance) Act exempts certain items from the category of "assets" for the purpose of determining eligibility, but in ss. (w) and (y) the loss-of-income portions of settlements of the 1986-1990 Hepatitis C class action and of settlements of claims for damages for abuse suffered at Indian residential schools are excluded. (The 1986-1990 Hepatitis C Settlement Agreement may be seen on the internet at <http://www.hepc8690.com/english/main.htm>.) Undoubtedly, these provisions were the result of negotiations between the government and claimants in those cases. Nevertheless, they suggest a view that receipt of a tort award of damages for loss of income should preclude the additional receipt of statutory income assistance payments. This approach is consistent with my opinion of the meaning and objects of the parent legislation.
- [170] I cannot agree with the submission that income assistance payments must be seen as a social allowance unrelated to a loss of income because the legislative scheme is broad and provides for other kinds of assistance for needy recipients, such as health care, daycare, homemaker services, and retraining and rehabilitation services. In my view, if such services were made necessary by tortiously-caused injuries and if they were provided by government under the scheme, the injured plaintiff would suffer no loss and could not recover their cost from the tortfeasor. 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 v. Britten* (1984), 56 B.C.L.R. 273 (C.A.); cf. *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] S.C.J. No. 8 (Q.L.) 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 (paras. 28-29).

[171] Accordingly, the fact that types of assistance other than income assistance are provided under the legislative scheme does not tell against my view of its nature, and I see no reason why income assistance payments received should not similarly offset past loss of income and preclude a tort award for the same loss.

[172] In my opinion, the legislative scheme enacted by the GAIN Act and by its successor, the B.C. Benefits (Income Assistance) Act, was intended to provide a temporary income to qualified recipients sufficient to pay for their basic needs of life during periods in which, for reasons beyond their control, they are unable to be gainfully employed. As such, the income payments are a replacement or substitution pro tanto for employment income and to the extent that she received income assistance payments the plaintiff has not suffered any pre-trial loss of income.

[173] I would deal with the allocation problem identified by Mr. Justice Mackenzie in paras. 104-5 of his draft reasons by reducing the award for past loss of income by the amount of the income assistance payments received that bears the same proportion to the total of such payments as the award against the foster father, as found by this court, bears to the total past loss of income found by the trial judge.

[174] Finally, I agree with Mr. Justice Hall, for the reasons he has expressed in para. 145 of his draft reasons, that it is not necessary in the circumstances to consider the submission that, because the Province is the source of both the income assistance payments and the tort damages, the income assistance payments should be deducted from the award for past loss of income.

"The Honourable Mr. Justice Smith"

Disposition of the Court:

DEDUCTIBILITY OF SOCIAL ASSISTANCE BENEFITS

[175] Madam Justice Prowse (Chief Justice Finch and Mr. Justice Mackenzie concurring) would dismiss the Crown's application to have social assistance benefits deducted from the award of \$50,000 for past loss of opportunity to earn income on the basis that the receipt of those benefits by M.B. does not result in double recovery.

[176] Mr. Justice Hall and Mr. Justice Smith (dissenting on this issue) would grant the Crown's application to deduct social assistance benefits from the award for past loss on the basis that the retention of these benefits by M.B. would result in double recovery. They would, however, adjust the amount to be deducted to take into account the fact that the foster father was not solely responsible for the past loss.

CALCULATION OF INTEREST ON THE AWARD FOR PAST LOSS

[177] Mr. Justice Mackenzie (all members of the panel concurring) would allow the Crown's appeal on this issue and hold that interest should be calculated on the award for past loss in accordance with s. 1(2) of the Court Order Interest Act by treating the award as a stream of income received evenly over the period starting six months after the cause of action arose and ending at the date of judgment.

COSTS

[178] Madam Justice Prowse (Chief Justice Finch and Mr. Justice Mackenzie concurring) would grant M.B. her costs of this aspect of the appeal, subject to further submissions from the parties.

RESULT

[179] The Court's award of damages for past loss of opportunity to earn income in the amount of \$50,000 is confirmed; the Crown's appeal with respect to the calculation of interest on that award is allowed; and M.B. is entitled to her costs of this aspect of the appeal (subject to further submissions by counsel).

"The Honourable Chief Justice Finch"

"The Honourable Madam Justice Prowse"

"The Honourable Mr. Justice Hall"

"The Honourable Mr. Justice Mackenzie"

"The Honourable Mr. Justice Smith"

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