The Grossup for Taxes must include hidden taxes

The courts have long recognized that an accident victim awarded funds to purchase future medical services must also be given money to pay the taxes on the interest the invested award will earn. This "tax grossup" is needed under the principle that the victim should be left as well off as before the accident. The same reasoning suggests we must also take account of other government programs that include an element of taxation, even if they are not called "taxes" by our governments.

Some claims will not be greatly affected by including taxes that are disguised under other names. The traditional method of estimating the grossup for taxes, looking only at what our governments actually calls "taxes", produces the largest grossup awards for plaintiffs who are also receiving large awards for loss of earnings, for younger plaintiffs whose funds will be invested for many years, and for those whose costs of care are not eligible for the income tax medical expense credit. Including the taxation impact of hidden taxes, in contrast, can greatly increase claims of plaintiffs with low income loss claims and low residual incomes, who are over or nearing 65, and who were benefiting from government income support or health care programs before the accident. For some clients the loss of benefits under these hidden taxes exceeds the cost of conventional income taxes.

Hidden taxes are everywhere; to an economist any government program that treats *less* favourably those with *more* income includes a component of taxation. A plaintiff whose income has risen because she has received an award for medical care will likely find that government programs now give her fewer benefits because they are "means tested" - they give less to, or require larger contributions from, those with higher income. Or income support programs may "claw back" more of her income. The successful plaintiff may now pay fees or charges that would otherwise have been waived, or may pay more for her bus pass or her subsidized rent. Some programs are taxes thinly disguised under other names; for example, B.C. residents must pay a "Medical Services Plan premium", which is effectively a tax set at a level of zero (the *"Premium Assistance program"* pays the premium) for a person with a low income, rising with income until it reaches a maximum level equal to the premium.

In a recent B.C. case (*Forbes v Wilkinson*) Mr. Justice Kelleher accepted the argument that ignoring hidden taxes undercompensates a victim who has received an award for care. In an order [4 May 2005, Victoria Registry 04 0043] he asked the parties to provide further evidence and submissions with regard to not only "tax gross ups" but also "any change in the funds she receives or is entitled to, for home care provided to her by the Province of British Columbia or its agencies, as a result of this judgement" and any similar "change in the subsidy she receives or is entitled to, for her housing."

The programs referred to in *Forbes* are among a host of "means-tested" programs operated by federal, provincial and municipal governments in Canada.

For older clients the most important tax-like program is the "clawback" of the Guaranteed Income Supplement (GIS). The GIS is a payment to those over 65 that is reduced at a rate (equivalent to a tax rate) of 50 percent of any income an individual may have other than Old Age Security (OAS). The GIS clawback effectively represents the largest income tax for low income seniors. In British Columbia the "Seniors Supplement" is a similar means-tested income support program for seniors similar to the GIS. Federally, the OAS itself is clawed back from high income seniors.

In B.C. other programs help low income families with the costs of eyeglasses and basic dental care for their children, rental housing, transit passes, home care, or recreation. The Fair Pharmacare program assists low-income residents facing high drug costs. The B.C. Family Bonus for moderate-income families with children, the Canada Child Tax Benefit, the National Child Benefit Supplement and the B.C. Earned Income Benefit are all programs directed at those with low incomes, and their value is less to the successful plaintiff who has received award.

An economist calculates the usual tax grossup as the amount that must be added to a fund to allow taxes to be paid while still providing for the plaintiff's medical and care needs. Including other government and quasi-governmental programs along with taxes means an already laborious calculation becomes more so and a larger computer program is required. Assumptions must be made about the future of the tax system and programs (rates, deductions, credits), about the person (will she be single and childless), and about inflation, mortality, and the form in which the funds will be invested.

Despite the complexity, neglecting to account for hidden taxes can seriously undervalue the care cost claim of an older, low-income client.

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