Ontarians Aging with a Disability:
A Tortious Perspective on Provincial and Federal Benefits Programs

Legal Research Memorandum

Citizens With Disabilities Ontario (CWDO)
Pro Bono Students Canada (PBSC) - Lakehead University Chapter

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Introduction:

For as impressive as Canada's social assistance programs may appear on the outside, the realities of navigating these systems from the inside are particularly egregious. In specific reference to disability support programs, these dense, jargon-heavy policies seem to model themselves after spiderwebs, preying on vulnerable Canadians who find themselves ensnarled - or worse - falling through the gaps of its intricacies. For Ontarians aging with a disability, only one thing can be certain: uncertainty. In an examination of the interplay between provincial and federal social assistance programs, there arise significant contradictions that present considerable degrees of harm to the public's most vulnerable populations. During a tumultuous period of transition, disabled seniors without privatized insurance are losing critical care benefits due to semantical shifting between the highest tiers of government.

In the execution of this legal memorandum, it is intended that the research illustrates the current landscape of disability benefits in Ontario, articulates the points of conflict in the transition to senior-hood, and suggests a basis upon which a tortious action may be claimed.

Introduction to ODSP

For Ontarians experiencing disability, the Ontario Disability Support Program (ODSP) is the most prolific provincial benefits package. ODSP is available to residents of Ontario over the age of 18 who are in financial need and meet the program's definition of a person with a disability or are a member of a prescribed class.[1] The eligibility criteria for "financial need" involves a consideration of the applicant's basic household living expenses in relation to the household's income and assets.[2] This calculation is completed by a certified ODSP caseworker, who will require signed consent for the disclosure of large amounts of personal data, including familial structure, income, housing, medical records, and all government identification certificates. Generally, an individual will be found to be in financial need if the "costs of [their] household's basic living expenses are more than [their] household's income and assets," with a margin for the ODSP caseworker's discretion.[3] The benchmark for "disability" under which the ODSP operates is laid out in s. 4(1) of the *Ontario Disability Support Program Act,* 1997, S.O. 1997, c. 25, Sched. B. The definition of a "person with a disability" is as follows:

> (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
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> (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
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> (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications. 1997, c. 25, Sched. B, s. 4 (1).[4]

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[1] https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/income_support/IS_Eligibility.aspx

[2] https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/income_support/IS_Eligibility.aspx

[3] https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/income_support/IS_Eligibility.aspx

[4] Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sched. B

In limited circumstances, members of a prescribed class may bypass the disability adjudication process. While there are a variety of niche and nuanced situations in which a person may find themselves in this category, the prescribed classes most pertinent to this scope of research includes individuals who are already receiving Canada Pension Plan Disability (CPP-D) benefits, or persons over the age of 65 who do not qualify for Old Age Security (OAS). [5]

At present, ODSP does not disclose their algorithm for determining the value of a successful applicant's total benefit allotment; however, government sources have published a basic matrix of maximum benefit allowances for six permutations of marital status and number of dependents. In 2022, the highest value granted to a single adult without dependent children is $1169 per month.[6] This sum is intended to alleviate the costs of food, housing, and transportation in place of gainful employment. In addition to the financial assistance, ODSP also includes recipient health, dental, and vision care.

While ODSP does not have a natural expiry date, it is not compoundable with alternative benefits. While this will be explored in greater detail in a later section, it is important to note that ODSP is generally incompatible with benefits for older adults, including Canada Pension Plan Retirement (CPP-R) benefits, Old Age Security (OAS), and Guaranteed Income Supplement (GIS). ODSP is considered to be a "last resort"

[5] https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/income_support/PrescribedClasses.aspx

[6] https://www.mcss.gov.on.ca/en/mcss/programs/social/directives/odsp/is/6_1_ODSP_ISDirectives.aspx

source of funding; as such, there are strict limitations about its compatibility with other sources of social assistance.[7]

Introduction to CPP-D

In comparison, the Canada Pension Plan Disability (CPP-D) benefit is a federal financial assistance program. Eligibility for CPP-D is open to all Canadians with a disability (excluding Quebec) who are under the age of 65 and have made sufficient contributions to the Canada Pension Plan. While the characterization of "sufficient" is not listed on the primary source documents, additional government commentary provides that the correct interpretation of this clause requires applicants to "1.) have made valid contributions to the CPP in 4 of the last 6 years, 2.) have contributed for at least 25 years, including 3 of the last 6 years, or 3.) meet the requirements for the late applicant provision."[8] Unlike the ODSP criteria, CPP-D eligibility does not include financial need - assistance is based wholly on the applicant's disability status. The definition of disability under CPP-D is drawn from s. 42 (2) of the *Canada Pension Plan* (R.S.C., 1985, c. C-8). The classification is read as follows:

> (a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

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[7] https://www.mcss.gov.on.ca/documents/en/mcss/social/info_sheets/ODSP_what.pdf

[8] https://www.canada.ca/content/dam/canada/employment-social-development/programs/pension-plan-disability-benefits/reports/cpp-disability-toolkit-interactive-EN.pdf

> (i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and
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> (ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and
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> (b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.[9]

CPP-D exclusively provides monetary assistance and does not provide any benefits in terms of health, dental, or vision care. While the precise amount of assistance is determined on an individual basis, federal government publications indicate that in 2022, the basic payment value is $524.64, the average monthly CPP-D amount is $1031.55, and the maximum allowance is $1457.45.[10] While CPP-D may be combined with other pensions (including the CPP survivor's pension and the post-retirement disability benefit), the total amount paid cannot be greater than $1457.45 per month. Moreover, once the recipient reaches 65 years of age, the CPP-D benefits automatically roll over to the CPP-R benefit; while the amount paid is dependent on a number of individual variables, the maximum monthly value is $1154.58 with the average monthly amount being $679.16.[11]

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[9] https://laws-lois.justice.gc.ca/eng/acts/c-8/page-9.html#h-168629

[10] https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-disability-benefit/benefit-amount.html

[11] https://www.canada.ca/en/services/benefits/publicpensions/cpp.html

The Relationship Between ODSP and CPP-D

For many Ontarians, the prospect of combining benefits programs may seem highly advantageous; however, the practical implications of this practice are markedly less so. As referenced, ODSP eligibility is delicately balanced on the recipient's financial need. While ODSP and CPP-D are not mutually exclusive, ODSP will offset their contributions dollar to dollar with the monthly payments received from CPP-D. For example, if a recipient is entitled to $1000 from ODSP per month and qualifies for $800 from CPP-D, ODSP will decrease their installments to $200 so as not to increase the recipient's monthly payments. Accordingly, the greatest value that could theoretically be obtained from the combination of ODSP and CPP-D could not exceed the ODSP maximum of $1169 for a single, childless adult. In the event that a recipient's CPP-D allotment surpasses the value of the pre-existing ODSP benefit, the recipient will immediately be disqualified from further ODSP contributions. More disastrously, because CPP-D is purely a monetary benefit, the recipient may be left without the health, dental, and vision care they were previously entitled to under ODSP.

When applying for any disability benefit, it can be difficult - if not impossible - to reliably calculate the monthly value approved for any particular individual. For this reason, it would be foreseeable that many ODSP recipients who may otherwise qualify for CPP-D would refrain from applying if their existing ODSP care benefits be revoked. However, ODSP accounts for this circumstance in s. 11 (1) entitled "Obligation to

Pursue Resources" of the *Ontario Disability Support Program Act.*[12] Pursuant to this legislation, recipients of ODSP must demonstrate "reasonable efforts to obtain compensation or realize a financial resource or income that the person may be entitled to or eligible for" to the satisfaction of an appointed director.[13] Should the director determine that the recipient is not taking meaningful steps to obtain alternative benefits to which they may be entitled, the income support provided from ODSP may be reduced by the value of the alternative benefit or refused entirely.[14] These efforts are tracked and reported on a monthly basis in conjunction with the recipient's income and asset statements.

In the cases in which an Ontarian receiving ODSP qualifies for CPP-D in a lesser monthly amount, the individual will continue to receive the same monthly benefits but with a greater set of responsibilities. ODSP and CPP-D are independent of each other and therefore each assign their own representative to the recipient. As referenced, ODSP requires a monthly statement of income; additionally, ODSP recipients are required to attend interviews "from time to time" with administrative staff to demonstrate their continued financial need, disability status, and compliance with the *Act*'s provisions.[15] CPP-D implements a case-specific approach to regulation and oversight; for more precarious conditions, CPP-D officials may request updates as frequently as every six months.[16] Moreover, CPP-D officials may request additional information if they

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[12] https://www.ontario.ca/laws/regulation/980222

[13] https://www.ontario.ca/laws/regulation/980222

[14] https://www.ontario.ca/laws/statute/97o25b

[15] https://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/client/responsibilities.aspx

[16] https://disabilitycreditcanada.com/cpp-disability-benefits-frequently-asked-questions/

become informed of a recipient's undertaking of new procedures or treatments which may alter their disability status. For recipients with chronic or unimproving conditions, CPP-D check-ins may be as infrequent as once every three years. Ultimately, however, it is quite plausible that an individual receiving ODSP be required to apply for CPP-D only to be allotted the same benefits but with a greater duty to liaise.

Considerations Specific to Older Adults and Seniors

In specific reference to Ontarians aging with a disability, it is the opinion of this body of research that CPP-D is not an advantageous program for disabled adults entering their senior years. Contextualized by the circumstances above, CPP-D is simply unavailable to Ontarians over the age of 65.[17] At a time when most Ontarians will begin to experience new or worsening effects of disability, the federal government terminates all disability-oriented support programming.

In the event that a person with a disability opts for early retirement benefits, they may become eligible for the CPP post-retirement disability benefit (PRDB).[18] PRDB is available to individuals between the ages of 60 and 65 who have been receiving CPP-R payments for more than 15 months.[19] A person who is eligible for PRDB is no longer

[17] https://laws-lois.justice.gc.ca/eng/acts/c-8/index.html

[18] https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-post-retirement-disability-benefit.html

[19] https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-post-retirement-disability-benefit.html

eligible to receive CPP-D benefits.[20] For 2022, the value of this benefit is $524.64 and works as an enhancement for the regular CPP-R monthly payments, which are calculated based on a person's lifetime contributions to the CPP and their income. For 2019, the maximum monthly amount a new recipient could have collected (starting the pension at age 65) was $1,154.58 - *inclusive* of additional payments from PRDB or other pension support programs. The average monthly value was $679.16.[21]

While ODSP, as legislated, does not explicitly terminate its benefits for recipients over the age of 65, eligibility for alternative seniors' benefits - namely, those under the Old Age Security (OAS) program - nullifies most ODSP recipients from continued qualification. As of 2018, the average discrepancy between annual ODSP and OAS payouts was approximately $4000 in favour of the latter.[22] In addition to the financial differences, OAS (like CPP-D) does not include any additional health, vision, or dental care benefits - requiring the recipient to incur greater personal expenses than what they would have received under ODSP. Furthermore, because of the aforementioned s. 11 (1) of the *Ontario Disability Support Program Act,*[23] this is an unavoidable reality for many disabled Ontarians without private-sector insurance plans or employer pensions.

The Removal of Benefits: A Tortious Perspective

[20] https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-post-retirement-disability-benefit.html

[21] https://www.canada.ca/en/services/benefits/publicpensions/cpp.html

[22] https://www.youtube.com/watch?v=vkjMSCOLTlY&list=PLi8AduOLCzgVWaLL5QHCzpzZSyfsE1B_k&index=2

[23] https://www.ontario.ca/laws/regulation/980222

In considering the interplay between federal and provincial benefits for Ontarians aging with a disability, this research suggests significant ramifications for recipients after the age of 65. More specifically, this research indicates the potential for a notable decrease in monetary and care-related benefits for disabled Ontarians relying on government assistance programs that could drastically impede on their ability to sustain their usual lifestyle. This issue, however, is whether it is a tortious act on behalf of the government to acclimatize disabled adults to a specific lifestyle standard with the knowledge that at the age of 65, the resources sustaining that lifestyle will be automatically revoked.

A. *The Legal Recognition of Lifestyle*

The legal acknowledgement and prioritization of maintaining an established lifestyle is not a novel one. In fact, this concept has been legislated and perpetuated within the context of family law over the last several decades. With specific reference to Ontario, the *Family Law Act*, R.S.O. 1990, c. F.3 section 9 (f) declares that

> [i]n determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including [...] (f) the dependant's needs, in determining which the court shall have regard to the *accustomed standard of living* while the parties resided together[24]
>
> [*Emphasis added*]

[24] https://www.ontario.ca/laws/statute/90f03#BK14

This principle was exercised in the case of *Kerr v. Baranow*, [2011] S.C.J. No. 10, a matter in which the plaintiff, Ms. Kerr, a disabled woman in her 60s, was found to be "entitled to a spousal support award that would permit her to live at a lifestyle that is closer to that which the parties enjoyed when they were together" upon her divorce from her husband of more than 25 years.[25] The court came to this conclusion in close consideration of the length of the relationship, her age, her limited income, and the significance of her disability, ultimately prevailing over the "unjust enrichment" argument presented by the defendant.[26] Ultimately, the existence of the "accustomed standard of living" principle in family law indicates the legal machinery necessary to lay the foundation for the alleged tort claim.

B. Plausible Claims in Tort

On the evidentiary basis that an accustomed standard of living principle may permeate beyond the boundaries of family law, it begs the question: does the failure to uphold such a standard breach a duty of care? Could the instantaneous removal of the supports which uphold this standard amount to the intentional infliction of mental suffering?

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25 https://advance.lexis.com/document/?pdmfid=1505209&crid=81bb33c3-2bf0-4f4c-90e6-d90b767b0873&pdworkfolderid=4abdaa82-cada-42cc-b158-5451b0eb0d3d&pdopendocfromfolder=true&ecomp=Jmhg&earg=4abdaa82-cada-42cc-b158-5451b0eb0d3d&prid=3dc84848-6416-4610-8de6-2728fbfef7b4

26 Kerr v Baranow, [2011] SCJ No 10

In consideration of the former, negligence refers to conduct which fails to meet the required standard of care.[27] In the last year, the Supreme Court has updated the law on government liability in negligence in its ruling on *Nelson (City) v. Marchi*, [2021] S.C.J. No. 4. Though the decision did not drastically alter the law's approach to government negligence, it did establish a four-part test that will guide the lower courts in determining whether government conduct is immune from liability. The test proceeds as follows:

1.) the level and responsibilities of the decision-maker;
2) the process by which the decision was made;
3) the nature and extent of budgetary considerations; and
4) the extent to which the decision was based on objective criteria.[28]

Alternatively, intentional infliction of mental suffering refers to acts that demonstrate an intention to produce harmful or distressing effects.[29] In a claim of action, the plaintiff must satisfy the three-part test originally established in *Wilkinson v. Downton*, [1897] 2 Q.B. 57, 66 L.J. (Q.B.). Ultimately, the plaintiff must prove that:

1.) the defendant's acts were extreme, flagrant, or outrageous;
2.) the specific acts were calculated to produce harm; and
3.) the specific acts caused actual harm[30]

C. *Crown Liability in Tort*

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[27] Linden, Klar, & Feldthusen. *Canadian Tort Law.* LexisNexis.

[28] Nelson (City) v Marchi, [2021] SCJ No 41

[29] Linden, Klar, & Feldthusen. *Canadian Tort Law.* LexisNexis.

[30] *Wilkinson v. Downton*, [1897] 2 Q.B. 57, 66 L.J. (Q.B.)

Pursuant to the federal *Crown Liability and Proceeding Act*, s. 3 (b) states that "[t]he Crown is liable for the damages for which, if it were a person, it would be liable…in any other province [excluding Quebec], in respect of (i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property."[31] With that established, the *Act* proceeds to state in s. 9 that

> No proceedings lie where pension payable
>
> No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.[32]

Read plainly, it appears as if this provision precludes recipients of CPP-R, CPP-D, and PRDB from bringing action against the Crown; however, this matter was fleshed out before the Supreme Court in the matter of *Sarvanis v. Canada*, [2002] 1 S.C.R. 921. Sarvanis, a former inmate of the Pittsburgh Institution, was severely injured while performing work at the prison's farm. The injuries Sarvanis sustained left him unable to work and he subsequently began collecting CPP-D benefits - additionally, within two months of the accident, Sarvanis brought an action against the Crown in tort. The Crown originally mounted the defence that it was "statute-barred by s. 9 of the *Crown Liability and Proceedings Act*" and therefore, could not be held liable in tort;

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[31] https://laws-lois.justice.gc.ca/eng/acts/C-50/page-1.html#h-138340

[32] https://laws-lois.justice.gc.ca/eng/acts/C-50/page-1.html#h-138361

however, the court held that this was a misapplication of the legislation.[33] Ultimately, the court found that "Section 9 of the Crown Liability and Proceedings Act, properly construed, does not immunize the Crown from tort liability where an individual has received benefits under the CPP" and that disability benefits fall outside of the provision's scope.[34]

In an examination of Ontario's provincial policies, the *Crown Liability and Proceedings Act,* 2019, S.O. 2019, c. 7, Sched. 17 asserts the following:

> 9 (1) The Crown is not liable for torts committed by,
> (a) Crown agencies;
> (b) Crown corporations;
> (c) transfer payment recipients; or
> (d) independent contractors providing services to the Crown for any purpose.[35]

Of particular interest, subsection (c), transfer payment recipients, is defined as "a person or other entity that directly or indirectly receives a grant, transfer payment or other funding or financial assistance from the Crown to support, in whole or in part, the delivery of services to members of the public."[36] In the "Transfer Payment Accountability

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[33] https://advance.lexis.com/document/documentlink/?pdmfid=1505209&crid=dcbd7f0f-5d83-45aa-8df2-8646a1aa324d&pdworkfolderid=c9cedc1a-6f5f-4b12-8838-80d1f7d6e6a8&ecomp=r388k&prid=c63f9314-e934-46d4-ad9e-069f85ff2516

[34] https://advance.lexis.com/document/documentlink/?pdmfid=1505209&crid=dcbd7f0f-5d83-45aa-8df2-8646a1aa324d&pdworkfolderid=c9cedc1a-6f5f-4b12-8838-80d1f7d6e6a8&ecomp=r388k&prid=c63f9314-e934-46d4-ad9e-069f85ff2516

[35] https://www.ontario.ca/laws/statute/19c07c#BK10

[36] https://www.ontario.ca/laws/statute/19c07c#BK10

Directive," the province further clarifies that individuals receiving disability support payments (i.e. ODSP) are classified as transfer payment recipients.[37] This is a crucial distinction as it extends liability exemption to the collectors of ODSP, and not the central governing body of ODSP itself. As the primary piece of legislation overseeing provincial government liability in tort, it is evident that there is no statutory basis for the exemption of an action in tort against the provincial government in relation to the Ontario Disability Support Program. This assertion is supported by copious amounts of case law, demonstrating numerous cases in which a plaintiff receiving ODSP has successfully brought an action against the provincial government (see Appendix). Ultimately, in considering both legislation and jurisprudence, it seems entirely plausible to bring about tortious action against the provincial government from harm relating to undue ODSP disqualification.

Conclusion

Undoubtedly, for Ontarians experiencing disability, the stark removal of governmental support resources will cause significant disruptions to accustomed standards of living. Should this principle (adopted from family law precedent) be applied

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[37] https://www.ontario.ca/page/transfer-payment-accountability-directive

to the context of disability benefits for aging Ontarians, recipients of ODSP, CPP-D, and other disability supports would have a fulsome foundation upon which to bring action against government bodies relating to the dismissal of disability-oriented benefits at the age of 65. Through statute and jurisprudence, both the federal and provincial governments have allowed recipients of disability benefits to pursue tort claims relating to their collection. Ultimately, based on the evidentiary findings of this body of research, it is plausible to conclude that such a tortious action could be brought to amend the unjust dismissal of disability benefits for Ontarians over the age of 65.

Appendix

Zaki v. Director, Ontario Disability Support Program [Indexed as: Zaki v. Ontario (Director, Disability Support Program)], 137 O.R. (3d) 538

Corrigan v. Director of the Ontario Disability Support Program [Indexed as: Corrigan v. Ontario (Director, Disability Support Program)], 134 O.R. (3d) 547

Holmberg v. Ontario (Director, Disability Support Program), [2010] O.J. No. 3082

Surdivall v. Director of the Ontario Disability Support Program [Indexed as: Surdivall v. Ontario (Director, Disability Support Program)], 119 O.R. (3d) 225