



FUTURE CARE COSTS

Authors

ADRIENNE M. KIRSH
DAVID F. MACDONALD

Research completed by:

ADAM A. HALIOUA

Introduction

In Catastrophic Injury cases, preparation and presentation of Future Care Costs should be the greatest focus of Plaintiff and Defence counsel's attention in approaching mediation and trial. Future Care Costs form the largest component of a catastrophically injured Plaintiff's claim. The Life Care Plan or the Future Care Cost Report is the most important anchor to quantify the Plaintiff's future needs.

This paper offers a review of significant decisions which address future care needs and their quantification. In addition we will focus on the larger service components of the Future Care Cost claim and address the necessary qualifications of persons engaged to prepare Future Care Cost Reports/Life Care Plans.

A thoroughly prepared Plaintiff's counsel working with an appropriately qualified Life Care Planner can present appropriate claims for the future needs of severely brain injured, burned, spinal cord injured or mentally and behaviourally challenged Plaintiff's claims in a manner that should engage the co-operation and agreement of defence counsel to secure funding that will adequately meet a person's lifetime needs.

Whether at mediation or trial, it is essential that the Plaintiff's life care plan not be seen to be overreaching or exaggerated or not supported through independent signed expert reports and/or *viva voce* evidence by the injured Plaintiff's treating practitioners.¹

Significant concerns to be addressed by a Life Care Plan and a presentation of the costs of future care will include:

- A. The level of attendant care required;

¹ Song v. Hong, 2008 Can LII 21420 (ON.S.C.) p.9

- B. Appropriate combination of professional services;
- C. The need for a Rehabilitation Support Worker;
- D. Medication;
- E. Housing modifications, vehicle modifications and environmental controls;
- F. Avocational, recreational and/or vocational rehabilitation/retraining;
- G. Life expectancy;
- H. Gross Up;
- I. Management Fee.

The Author of the Life Care Plan

I recommend to all counsel the seminal work by Professor Roger O. Weed: *Life Care Planning and Case Management Handbook*.²

This work contains numerous examples of life care plans for persons suffering different impairments. In addition, it offers comments from plaintiff and defence counsel on approaches to building life care plans and addressing their deficiencies.

Central to the book is the suggestion that it would be appropriate for all life care plans to be completed by Board Certified Life Care Planners. A close review of the proposed future care evaluators CV should be made to satisfy you that they are appropriately qualified to author such an important document.

Without exception, the life care planner should also be in close contact with members of the Plaintiff's treating team to determine recommendations and/or obtain endorsement to recommendations which the life care planner has. The life care planner should have access to all of the medical documentation available in the case before he or she embarks on the project of identifying and quantifying future needs.

Discerning the Need for Ongoing Daily Support

For those most severely injured, it would be appropriate to address how their needs may best be met by appropriate services.

For those who suffer severe cognitive, neurological, mental or behavioural impairments, consideration should be given to the best use of attendant care providers and Rehabilitation Support Workers. Attendant care would normally be required for these severely injured persons. To address whether attendant care or Rehabilitation Support Work would be best to assist with particular circumstances, the question needs to be asked at varying intervals whether the

² Weed, R. (2004) *Life Care Planning and Case Management Handbook*, (2nd ed.) Boca Raton, Florida; CRC PRESS LLC

purpose of the appropriate service is “to do for the injured person” or “to help the injured person do more for him or herself”.

If the answer to the question is just that the need is “to do for” the person, then less skilled and less expensive attendant care may meet that need; whereas, if the question is answered on the basis that service needs to assist the person “to do more for him or herself” then consideration should be given to whether a qualified and supervised Rehabilitation Support Worker can best engage the injured Plaintiff.

The Track Record of Need and Use of Medical, Rehabilitation and Attendant Care Supports

At the point in the case when a Future Care Cost Report is normally sought, the Plaintiff should have received considerable medical and rehabilitative support, especially if there has been the opportunity for funding of same through no-fault benefits, group policies of insurance, advance payments or private funding.

The information gleaned through those practitioners’ reports as to the Plaintiff’s past needs is of significant assistance in several different ways. Ordinarily, where there has been a need that has been met through payment of private rehabilitation providers through one of the above sources, information as to the historical cost of those services will be available.

The cost per year of care and medical/rehabilitation needs is typically referred to as the “burn rate”. The past burn rate will help in part to predict the future financial need.

Catastrophic Brain Injured Life Care Planning Needs

The injuries and impairments sustained by catastrophically brain injured claimants give rise to substantial future care cost awards as a direct result of the complex nature of the injuries and resulting care and other rehabilitation needs required. The severe brain injury survivors will likely suffer a lifetime of memory loss, impulsivity, disinhibition, limited awareness of his/her own lack of judgment, decreased concentration, decreased focus and attention, inability to make decisions without prompting assistance, task initiation impairments, aggression and impatience.

These impairments often give rise to the need for not only 24-hour attendant care providers who are specifically trained in dealing with brain injured clients, but also for appropriately trained, skilled and supervised rehabilitation support workers who assist in implementing therapy goals for brain injured clients under the direction of the treating therapy team.

Assessing Attendant Care Needs and Expense in the Tort and Accident Benefit Context

Unfortunately, although there may be a need for a Plaintiff to receive attendant care from a provider trained in brain injury impairments, in reality, without the availability of adequate funding for same, it is often family members that end up providing the care.

Future care cost claims are assessed quite differently from a Statutory Accident Benefits Schedule ('SABS')³ and tort perspective. The SABS has prescribed limitations with respect to what cost of care can be recovered at certain professional rates. Those rates are set arbitrarily by the Financial Services Commission of Ontario ('FSCO') and often fail to reflect the actual fair market value cost of purchasing necessary services for injured persons in the open commercial marketplace.

For example, the current attendant care assessment Form 1⁴ under the SABS calculates need based on the number of minutes of assistance required in different categories multiplied by a prescribed hourly rate.

For Level 1 attendant care such as assistance with dressing, applying prosthetics, grooming, feeding and assistance with mobilizing, the prescribed hourly rate is \$11.23.

For Level 2 attendant care such as hygiene and basic supervisory care including re-attaching tracheotomy tubing or requiring assistance in an emergency situation, the hourly rate is \$8.75.

For Level 3 attendant care assistance such as assisting with toileting, tracheotomy care, ventilator care, exercise, skin care, medication administration, bathing and skilled supervisory care (when a Plaintiff suffers from violent behaviour that may result in physical harm to themselves or others), the hourly rate is \$17.98.

If a Plaintiff has to hire an attendant care provider from a commercial agency, that provider is not bound to only charge the hourly SABS rates for services. In fact, commercial agency personal support workers are currently charging on average \$26.00/hour, almost \$8.00 more/hour than the highest hourly rate level as prescribed in the SABS Form 1.

The Plaintiff is only entitled to receive from the SABS insurer the monthly amount of prescribed Form 1 attendant care, thereby often forcing family members and

³ Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996, O.Reg. 403/96, as amended

⁴ Form 1 – current Assessment of Attendant Care Needs, made pursuant to Ontario Regulation 63/08 made under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended

friends to assist with care for which they will not be compensated at the time the care is provided. In tort, however, those limitations do not exist. Past and future attendant care over and above the SABS insurer's obligations to pay should be claimed and recovered from the tort insurer.

Quantifying Care Provided By Family Members

Although family members may have been providing necessary care to a Plaintiff up until time of trial without payment, this lack of direct expenditure can not be assumed to continue into the future. Family members may die or have other commitments. Further, court decisions have agreed that to do so would be to provide an indirect benefit to the Defendant. It should not matter whether a Plaintiff has "incurred" the expense in the past, in order to allow recovery for future care costs.

The defence may attempt to argue that the Plaintiff and their family should get by with less than full compensation for care and attempt to rely upon the gratuitous care provided by family members in the past as evidence of similar gratuitous care to be provided in the future. If family members are unable to provide care, often, the defence may argue that a Plaintiff ought to be warehoused in a nursing home, and be forced to rely on subsidized governmental services.

However, with respect to quantifying the past and potentially future value that family members contribute to a Plaintiff's care, well-being and physical safety, known as 'in trust' claims, Courts have made it plain that the market value of these services is appropriate to consider and nothing less than that. The Supreme Court of Canada has confirmed that the assessment of future care costs is to be undertaken without regard to the involvement of or contributions by family members.

The Court's objective is to assure that a severely injured Plaintiff is cared for adequately for the remainder of his/her life and the standard of care to which the Plaintiff is entitled is extremely high. In the 1978 case of Andrews v Grand & Toy Alberta Ltd.,⁵ ("Andrews") The Honourable Mr. Justice Dickson, in writing a unanimous verdict, discussed the standard of care that a future care cost award should address:

"Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirmed husbands or sons are not expected to do so on a gratuitous basis..."⁶

⁵ [1978] 2 S.C.R. 229

⁶ *Ibid.* at page 11

Mr. Justice Dickson confirmed that “full compensation” is the paramount concern of the courts in cases of severely injured victims. In determining whether the Plaintiff ought to receive much more expensive home care as opposed to being placed in an institution, Mr. Justice Dickson confirmed the following:

“Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or prove the mental or physical health of the person injured, it may properly form part of the claim...there is no duty to mitigate, in the sense of being forced to except less than real loss. There is a duty to be reasonable. There cannot be “perfect” or “complete” compensation. An award must be moderate, and fair to both parties. Clearly, compensation must not be determined on the basis of sympathy, or compassion for the plight of the injured person. What is being sought is compensation, not retribution. But, in a case like present, where both Courts have factored a home environment, reasonable means reasonableness in what is to be provided in that home environment. It does not mean that Andrews must languish in an institution which on all evidence is inappropriate for him...Justice requires something better.”⁷

Full compensation for future care reflects a standard of care equivalent to the lifestyle which a claimant was enjoying pre-accident as Madam Justice McLachlin (as she then was) confirmed in the 1985 British Columbia case of Milina v. Bartsch at para. 172 ⁸:

“The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the Plaintiff.”

Madam Justice McLachlin’s decision was upheld by the British Columbia Court of Appeal.⁹

In the 1999 British Columbia case of Brennan v. Singh,¹⁰ Mr. Justice Harvey awarded damages on the basis of the expense being reasonably necessary rather than medically necessary as argued by the Defendant. Mr. Justice Harvey noted:

“It is what a reasonably minded person of ample means would be prepared to incur as an expense; and cannot in the remotest sense

⁷ *Ibid.* at page 10

⁸ [1985] B.C.J. No. 2762

⁹ 49 B.C.L.R. (2d) 99

¹⁰ [1999] B.C.J. No. 520

be considered a squandering of money; and for which there is a medical basis. I respectfully agree...”¹¹

The Plaintiff had substantial care needs and Mr. Justice Harvey summarized the factors to consider in assessing the cost of care to be provided by family members (“in trust” claims):

“In my view, it is useful to review briefly the factors which are considered in the assessment of such claims. They are:

- (a) Where the services replace services necessary for the care of the plaintiff;
- (b) If the services are rendered by a family member, here the spouse, are they over and above what would be expected from the marital relationship?;
- (c) Quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and
- (d) It is no longer necessary that the person providing the services has foregone other income and there need not be payment for such services.”¹²

An appeal of Mr. Justice Harvey’s decision on other grounds was dismissed by the British Columbia Court of Appeal in 2000.¹³

In the 1995 British Columbia case of Bracey (Public Trustee of) v. Jahnke,¹⁴ the Plaintiff had been confined to a wheelchair pre-accident and had been receiving in-home assistance for 3 hours/day. After her accident, she argued that she required 5 hours/day assistance for the rest of her life. The defence argued that she only required 4 hours/day for the first year post-accident and 3 hours/day thereafter for the remainder of her life, equivalent to what she was receiving pre-accident. Oliver J. agreed with Ms. Bracey that she would require additional care for the rest of her life:

“The fact that the plaintiff has been living with 3 hours per day of in-home assistance does not necessarily mean that 3 hours per day is what is reasonable to promote her mental and physical

¹¹ *Ibid.* at para. 91

¹² *Ibid.* at para. 95

¹³ [2000] B.C.J. No. 1026

¹⁴ [1995] B.C.J. No. 1850

health. The evidence from the bulk of the expert reports as well as from the testimony is that the plaintiff has more deficit and difficulty with every type of physical task. Further, this diminished physical capacity compounds and increases her frustration, isolation, and anger. It seems reasonable to assume in addition, that such a downward emotional spiral is only to be further aggravated by the fact that the assistant, although capable of performing the required tasks in 3 hours, is rushed in so doing. These present circumstances, in my view, are destined to complicate and add to the deterioration of the plaintiff's health.”¹⁵

An appeal by the Defendants of Oliver J.’s decision to the British Columbia Court of Appeal in 1997 reduced the future care costs from \$300,000.00 to \$253,000.00 in line with the actuarial report actually submitted to Oliver J. in evidence, with which the Respondents agreed.¹⁶

Justice does not require the severely injured plaintiff to just “get by” or “make do” with the cheapest possible care. The Court rejected this proposed approach and instead, followed the principles enunciated by the Supreme Court of Canada in Andrews.¹⁷ It is important to note that the Court was not prepared to have the level of past care dictate the level of future care. The sole consideration was the level of care that would be most beneficial to promote the physical and mental well being of the plaintiff.

In the 1997 Ontario case of Roberts v Morana,¹⁸ the brain-injured Plaintiff was awarded future care costs by Mr. Justice O’Brien on the basis of what she had lost and not what she could ‘make do’ with, including 12 hours/week of support at a cost of \$65.00/hour for a rehabilitation support worker who was specifically trained in assisting and caring for those with brain injuries. Mr. Justice O’Brien noted:

“Penny has been receiving substantial help from CHIRS since 1994 when she moved into her present apartment which is across the street from CHIRS offices. CHIRS hourly rates have increased from \$22.00 in 1992 to \$38.00 in 1995 and \$47.00 in 1997. Jane Staub testified she was advised by the CHIRS director that the fees were to be increased to \$65.00 (although this has not yet occurred). She also testified that the “going rate” for comparable services provided by companies operating for profit in the Toronto area is about \$90.00.”¹⁹

¹⁵ *Ibid.* at para. 35

¹⁶ [1997] B.C.J. No. 1100

¹⁷ *Andrews*, supra note 5

¹⁸ 34 O.R. (3d) 647

¹⁹ *Ibid.* at para. 272

“CHIRS workers have assisted her in doing things such as attending school (often one on one in the classroom) "training" her to use public transport and learning bus and subway routes. They arrange numerous recreational activities, often attending one on one with her when the activity requires; they take her grocery shopping (there is evidence from one worker that Penny would walk around the store with a list of items but was unable to find them, she would bring home frozen food and not know where to put it). One of the workers noted Penny was unable to keep her apartment clean and arranged for a cleaning lady and the worker tried to train Penny to use the laundry facilities in the apartment building.”²⁰

In the 2008 Ontario medical malpractice case of Matthews Estate v Hamilton Civic Hospitals,²¹ (“Matthews”) although the Plaintiffs lost at trial, Mr. Justice Spiegel accepted the Plaintiff’s contention that cost of care ought to be assessed at what it would have cost them to purchase the services of a registered nurse in the open marketplace and there should be no deduction based on the fact that family members rather than healthcare professionals provided services because they could not afford to pay for professional care. Mr. Justice Spiegel concluded:

“The Plaintiffs submitted that the primary caregiver’s services should be valued at the agency hourly rate of a registered nurse because the complex and unpredictable nature of Mr. Matthews care demanded the skills of a registered nurse. The defence contended that regardless of the quality of the services provided that it would be improper to compensate family members who were not professionals at a professional rate. I do not agree. It is the nature and quality of the services provided and their value to the person injured rather than the professional qualifications of the provider that should govern the assessment. I therefore accept the plaintiffs’ submission.”²²

Assessing the Claim for Past Attendant Care in Tort

Just as Justice Spiegel concluded that the appropriate value of the primary caregiver’s services should be the commercial hourly rate of a registered nurse for Mr. Matthews, His Honour also concluded that the past care claim should be assessed using the same hourly rate to compensate the family members who were providing care of a nature and quality equivalent to that of a registered nurse. As Justice Spiegel notes:

²⁰ *Ibid.* at para. 274

²¹ [2008] O.J. No. 3972

²² *Ibid.* at para. 189

“I would also observe that a claim for future care is clearly based upon the anticipated cost of obtaining the appropriate level of care in the marketplace. I see no principled reason why the assessment should be significantly different merely because the services have already been rendered. Otherwise, where sophisticated care is being provided by family members, it would be in defendant’s interest to delay the trial as long as possible so as to avoid the more onerous impact of an award for future care costs.”²³

Mr. Justice Spiegel used an hourly rate of \$30/hour to assess the cost of nursing care provided to Mr. Matthews by his family, noting that the average agency nursing rate was \$42/hour based on an inclusion of profit and overhead:

“This rate also reflects the fact that the sons acquired their skills largely by experience and therefore a lower rate should properly apply to the earlier years of their care giving. I use the rate of \$12 per hour for 4 hours per day for the second person.”²⁴

The cost of past care provided was assessed at a total of \$2,400,000.00.

In his decision, Justice Spiegel relied upon the 1998 Ontario Court of Appeal decision Parsons Estate v. Guymer²⁵. In that case, the Court of Appeal was dealing with the assessment of damages for the loss of services that the wife who was killed in an accident would have provided to her husband who had suffered a stroke unrelated to the accident.

Weiler J. A. speaking on behalf of the Court of Appeal, stated at para 10:

“In assessing damages, it is the value of services by the particular wife to the particular husband which must be determined... While the loss of the stroke-related care-giving functions that Margaret would have provided is incapable of strict arithmetical calculation, one starts with the proposition that the services which Margaret would have provided as a result of the Appellant’s stroke having a quantifiable economic value. In assessing the loss of Margaret’s stroke-related care, the cost of replacing that care in the marketplace is an important measure...”²⁶

Justice Spiegel adopted this comment in the Matthews Estate case noting:

²³ *Ibid.* at para. 194

²⁴ *Ibid.* at para. 195

²⁵ 1998 Can LII 1378 (ON. C. A.); [1998] 40 O.R. (3d) 445 (C.A.)

²⁶ *Ibid.*, at para 10

“While in Parsons the loss of services came under Section 61 (2) (e), I find that these remarks apply with equal if not greater force to claims under Section 61 (2) (d).”²⁷

Section 61 provides for payment of damages to the *Family Law Act* claimants, Section 61 (2) states:

“The damages recoverable in a claim under sub-section (1) may include:

- (d) Where, as a result of the injury, the claimant provides nursing, housekeeping, or other services for the person, a reasonable allowance for the loss of income or the value of the services;...”²⁸

Standard of Proof for Future Losses/Needs

The standard of proof for establishing a claim for future cost of care is the same as the standard of proof for establishing any kind of future pecuniary loss – simply a “real and substantial risk of pecuniary loss”²⁹ - not that a future loss will occur on a balance of probabilities.

It is never reasonable to assume that a family member will be available, or for that matter, should be available at all times to provide an injured claimant with the assistance and supervision they require. The methodology used in costing a future care report is to assume that all the care will be provided by outside professional services as there is never an assurance that an injured claimant will have access to family support. Parents and spouses of injured claimants age, have their own careers and develop their own personal health issues which prevent them from devoting their life to their injured family member.

If a Plaintiff can prove that there is a real and substantial risk that he/she requires someone to be with them for assistance 24 hours/day, and the accepted market rate for an agency-provided personal support worker is \$30.00/hour, that amounts to \$262,800.00/year. If, for example, it can be shown that a Plaintiff’s life expectancy is forty (40) years, with their injuries, and has a real possibility of requiring 24-hour care, using the prescribed Ontario net discount rate of 30.8443, (in this example) the amount of compensation for attendant care is \$8,105,882.04 before gross up.

²⁷ *Matthews*, Supra note 21 at para. 185

²⁸ R.S.O. 1990, C. F. 3, as amended

²⁹ *Graham v. Rourke* (1990) 75 O.R. (2d) 622 at pp 634-5; 74 D.L.R. (4th) 1(C.A.)

Attendant Care and/or “Lifeline”

Plaintiff and defence counsel should be attuned to the reasonableness of any suggestion that attendant care could be supplemented/substituted by a “Lifeline”. Such a suggestion would bring with it the conclusion that there would be a cost saving without altering the Plaintiff’s access to required attendant care. There are many foibles to such a suggestion which should be assessed in preparation for mediation or for trial for the purposes of determining the most appropriate solution to the Plaintiff’s needs for attendant care.

Lifeline is an electronic device which can be worn on the wrist or around a person’s neck which provides a button to be pushed in the instance in which a person required assistance. The objective of a Lifeline device is to allow the wearer to summons help with the push of a button causing the service centre that receives the signal to respond by sending emergency assistance to the home.

The most typical use of a Lifeline is for the purposes of assisting a senior, with a proven ability to live alone in his or her home, in the instance in which a fall occurs.

There are many issues that develop from a test of any assumption that Lifeline will ameliorate or eliminate in-person attendant care for a person with a severe mental, physical, neurological or cognitive impairment.

A review of the literature concerning Lifelines allows for the conclusion that is it not recommended for use at all with persons having suffered cognitive compromise.

One problem with the use of a Lifeline is that it assumes the only issue for safety concern during the night would be the occurrence of a fall, following which an injured claimant could press a call button to summons help. This often minimizes the considerable functional impact upon a claimant who suffers severe neurologic, cognitive, mental, behavioural or physical impairments.

As previously mentioned, brain injured claimants often suffer from an impaired ability to self-monitor, cognitive rigidity, difficulty with attention, impaired balance, impaired decision-making and problem solving abilities and reduced information processing speed. In the event that an injured claimant encounters a problem during the night requiring him or her to evacuate the premises or to implement another emergency response strategy in the situation of a power failure or flood, he or she would be placing themselves at considerable more risk for injury by not being able to move quickly, efficiently and safely without assistance.

A Lifeline does not assist an injured claimant who suffers from dizziness when he/she gets up in the middle of the night to go to the bathroom and falls, knocking him or herself unconscious or alternatively, when he/she suffers from a seizure.

A Lifeline does not assist an injured claimant who takes it off to bathe and then forgets to put it back on, or leaves it in one room and forgets where it is. The very nature of a Lifeline depends upon a claimant's ability to have the requisite continuing presence of mind and cognition to be able to press a button and call for help, which unfortunately, many brain-injured claimants do not have on account of their impairments.³⁰

The more general concern associated with reliance on the suggestion that Lifeline can assist seriously injured persons is that it is unable, even if used correctly at the moment of need, to duplicate the injured person's pre-accident ability to respond in case of any emergency, such as a fire, to move themselves to a place of safety in a near to equivalent amount of time as the person would have been able to do had that person not been injured.

Restoring a person as near as possible to that person's pre-accident status is a fundamental principle of tort compensation. A person with severe cognitive, mental, neurological or physical impairments will be unable to recognize and remove themselves from the emergency in which they find themselves to a safe place without the ongoing consistent personal presence of an attendant care provider who is capable of assisting them to react in a manner and timeframe as near as possible to their pre-accident ability to do so.

In the 2007 decision of Morrison v. Greig³¹ ("Morrison") Justice Glass addressed a defence argument that a Lifeline would be a more appropriate support than attendant care for Ryan Morrison who was catastrophically impaired by a spinal cord injury. He rejected the argument that any emergency which occurred to Ryan Morrison could be addressed appropriately by a Lifeline. He noted:

"For example if there were a fire and it was going to take a personal care worker a half an hour to come to his residence the Plaintiff might die in the meantime. This Plaintiff is not one who only needs a nanny to pick up after him. He needs someone who can be there right away and some one who understands the limitations of a spinal cord injured person so that he can be assisted properly."

Life Expectancy

Evaluating and obtaining probative evidence concerning a Plaintiff's life expectancy is critical to proving quantum for future care needs, whether at mediation or trial. It is appropriate to obtain an actuarial report concerning your client's life expectancy in preparation for mediation. Actuaries evaluate length of life using mortality rates.

³⁰ Compiled with the assistance of Occupational Therapist Ms. Carol Bierbrier, B.O.T.(c), O.T. Reg. (Ont.) CCRC, CCLCP of Carol Bierbrier & Associates, in December 2007

³¹ [2007] O.J. No. 225 at par.125

Often, counsel will enrol the assistance of McKellar Structured Settlements for the purposes of obtaining a valuation of a life care plan for tort and/or accident benefit purposes. If McKellar's provides a report in the accident benefit context, normally it will be accompanied with a summary report which indicates a range of "impairment ratings" that the quoting life insurance companies ascribe to the individual under consideration. An impairment rating is an opinion given by a life company as to its anticipation of the number of years earlier the specified claimant is likely to pass away, given the combination of impairments which is identified.

Future Care Cost Reports – Nuts and Bolts Issues

A future care cost report is a key negotiating tool and report to be relied upon at trial which provides a comprehensive multidisciplinary assessment of a catastrophic or non-catastrophic injured Plaintiff's medical and rehabilitation current and future needs. It is used to project what the costs of those needs will be over the claimant's lifetime based on their specific injuries and impairments. A good report will establish not only the Plaintiff's present day needs but also the replacement cost of required goods and services and varying scenarios as well as outline both the prescribed FSCO hourly rates for professional services³² as well as the hourly cost of professional fees at a commercial market rate that more correctly reflect current billing practices.

After obtaining a future care costing report, structured settlement costing can be used at any stage of the proceeding to quantify the present value of the various future care scenarios. Structured settlement costings are also useful in illustrating a stream of payments that a future care cost settlement could generate over the course of a claimant's lifetime.

A structured annuity costing represents the actual cost that a life insurance company would insist upon to take over a no-fault insurer's future lifetime obligation to pay benefits to a catastrophically injured claimant. It therefore, presents a real-world market value assessment of a settlement and can help an injured claimant organize their future by knowing how much money they will have each month to plan for their care. Furthermore, it is a useful tool because although the value of future care damages is calculated using the prescribed discount rates as set out in Rule 53.09 of the Ontario *Rules of Civil Procedure*,³³ ("*Rules of Civil Procedure*") these damages may be ordered to be paid by way of a structured annuity under the *Insurance Act*³⁴ and Sections 116 and 116.1 of the *Courts of Justice Act*.³⁵

³² The FSCO prescribed rates for professional services are found in Bulletins and Guidelines set out by the Superintendent of FSCO and posted on the FSCO website at www.fSCO.gov.on.ca

³³ R.R.O. 1990, Reg. 194, as amended

³⁴ R.S.O. 1990, c.I.8, as amended

³⁵ R.S.O. 1990, c.C.43, as amended

Table of Current Market Rates for Service Providers

Health care costs have increased exponentially over the last decade. In 1999, the average market rate of a registered nurse was \$21.00/hour, today, it can be as high as \$35.00/hour.³⁶ To provide a claimant with 24-hour nursing care can be \$306,600.00 annually. This does not include the overhead and profit built into agency rates to which Justice Spiegel alluded in Matthews.

The following table is an up to date compilation of average market rate cost of goods and services often required by an injured claimant, excluding medication costs³⁷:

Occupational Therapist	\$123.33/hour
Speech Language Therapist	\$125.00/hour
Physiotherapist	\$130.00/hour at home or gym-based; \$120.00/hour at a clinic
Rehabilitation Support Worker	\$58.34/hour
Social Worker	\$129.50/hour
Behavioral Psychologist	\$203.33/hour
Tutor	\$42.50/hour
Educational Consultant	\$100.00/hour
Attendant Care Provider/Personal Support Worker	\$26.88/hour
Job Coach	\$82.13/hour
Case Management Services	\$120.08/hour
Housekeeper	\$28.35/hour
Outdoor home maintenance	\$59.18/hour
Nanny (live-out)	\$516.67/week

Attendant Care vs. Rehabilitation Support Worker

The two major service components of a future care cost claim concern the necessity of attendant care and rehabilitation support worker intervention. A rehabilitation support worker performs a very different role from that of a personal support worker/attendant care provider. Some may argue that a rehabilitation support worker is only required for a couple hours a week to assist a Plaintiff on specific community reintegration outings such as participating in a volunteer program or attending classes at school and the remainder of the Plaintiff's care can be provided by an attendant care provider/personal support worker.

³⁶ Compiled with the assistance of Occupational Therapist Ms. Carol Bierbrier, B.O.T.(c), O.T. Reg. (Ont.) CCRC, CCLCP of Carol Bierbrier & Associates, in January 2009

³⁷ *Ibid.*

This approach maybe advanced by defence counsel without a considered evaluation of the roles and responsibility of attendant care providers versus rehabilitation support workers. It is significant monetarily as the commercial hourly rate of a rehabilitation support worker is higher than that of an attendant care/personal support worker. At the present time, the average commercial market rate of a Rehabilitation Support Worker is \$58.34/hour. It is \$26.88 for an attendant care provider.³⁸

Plaintiffs' counsel must be very careful in to address the difference between the roles of attendant care providers and that of a Rehabilitation Support Worker for a claimant who suffers severe cognitive, neurological, mental, behavioural or physical impairments.

The supervisory role of an attendant care provider is not interchangeable with the role of a trained Rehabilitation Support Worker. A Rehabilitation Support Worker who provides a level of service directed at the effective implementation of therapy goals into a severely injured client's daily routine by encouraging use of compensatory strategies, assisting with multi-tasking, coaching, prompting and mentoring.

Attendant care is most closely connected to maintaining the safety and well being of the applicant. If a person is unable to attend to their activities of daily living, requires assistance with walking, is unable to get in and out of a wheelchair independently, is cognitively impaired and/or unable to respond to an emergency, that person's physical, cognitive and/or emotional health are in jeopardy unless they are provided in-person access to the attendant care which they require.

The role of an attendant care worker is quite distinct from the Rehabilitation Support Worker and includes the following responsibilities:

- Providing basic supervision to client, the attendant may supervise the client throughout the day, but does not have the education or expertise to coach the client on following through with the day to day therapy goals;
- Assisting clients with mobility-issues in the areas of bathing, dressing and bathroom routines;
- Assisting ADL's including also conducting everyday household chores, including banking, cooking and grocery shopping on behalf of the client;
- Driving with clients to therapy and doctors appointments if necessary and if the attendant is equipped with a vehicle;
- Calling 911 for any behavioural and/or personal risk issues, as the attendant does not have the skills or training to support clients during periods of crisis.

³⁸ *Ibid.*

A Rehabilitation Support Worker (“RSW”) provides practice, guidance and reinforcement of therapy tasks to injured claimants at home under the direction of the discipline specialists such as physiotherapists, occupational therapists, speech language therapists, etc. RSW’s assist in engaging claimants in social and recreational activities within the home and within the community, including attending community activities and programs (e.g. attending church, using the local library, playing card games, etc.).

Aside from implementing therapy goals, an RSW provides ongoing guidance and cueing, support for planning, organizing, initiating and completing tasks, verbally promotes a claimant to recall information and attempts to successfully and appropriately integrate claimants into the community and at home as safely as possible in conjunction with attendant care providers.

Some of the tasks an RSW performs as distinct from an attendant care provider are as follows:

- Implementing all therapy goals into the clients’ day to day programming;
- Providing immediate verbal prompting to clients to assist with recalling information and personal navigation needs;
- Providing consistent verbal prompting to assist clients with maintaining focus and attention to the activities and tasks on hand;
- Assisting clients with multitasking duties and breaking down information into small parts to assist clients with processing information accurately;
- Providing education support with academic settings;
- Providing vocational and/or co-op placement support to assist clients with modifying their daily duties, under therapists’ directions;
- Providing immediate verbal counselling support to assist clients with problem-solving issues when they are agitated;
- Providing immediate crisis management support for clients, who attempt to harm themselves and/or others;
- Engaging in role play exercises to assist the client with appropriate social interactions and to assist with communication needs;
- Preventing the client from engaging in dangerous and unsafe impulsive behaviours that can be very inappropriate and/or harmful both personally and to others;
- Providing minor counselling and coaching to families during anxious and unmanageable moments at home;
- Transporting clients to all therapy appointments and participating in therapies if requested by the therapists;
- Reporting to all therapists regarding client progress and intervention strategies;
- Submitting weekly progress notes to all team members outlining achieved goals, including general observations;

- Submitting progress reports to all team members every 8-12 weeks, in which achieved goals and intervention strategies are documents,³⁹

Ultimately, the role of the RSW is to assist clients to successfully integrate themselves into their home and community environments as safely and independently as possible.

Gross-up & Management of Future Care Awards

Gross-up

Plaintiffs require additional awards to compensate them for the cost of care award tax consequences. The investment income from an award of future care is taxable although the award itself is not. A gross-up serves the purpose of compensating the Plaintiff for the income taxes they will have to pay on the investment income generated from their future care award. If there was no gross-up award paid to the Plaintiff, they would lose a significant amount of their future care cost award to taxes, thereby decreasing the significance of the future care cost award itself and rendering them unable to receive the care they have proven to require.

Calculating gross-up awards are complicated and best left to an actuary as numerous factors and assumptions are required to accurately assess the final proposed award. For example, a larger future care cost award will generate more interest and more tax, thereby leading to a higher gross-up. Young Plaintiffs will require a higher gross-up because they will have more investment interest income from their future care award and be in a higher tax bracket.

Management Fees

The calculation of a lump-sum award to be provided to a claimant for them to manage for the rest of their life assumes that the money will be invested. Usually, family members of an injured claimant who receives a future care cost award in the millions of dollars do not possess the expertise on how to properly invest this money for the claimant. Therefore, the investment and management of the funds becomes the responsibility of a corporate guardian, such as a trust company. The cost of this management is to be calculated after a claimant is awarded a lump-sum at trial. The cost of management is not automatic and evidence must be adduced that the services of a financial manager are indeed required. The three main components of guardianship and management fees are as follows:

- Compensation for the non-corporate Guardian
- Compensation for the corporate Guardian
- Legal fees for Guardianship

³⁹ Used with permission from Christine Kalkanis, Post Traumatic Rehabilitation, 2009

Some of a non-corporate Guardian's responsibilities include liaising with the treatment team to ascertain the claimant's needs at any given time, to act in the best interests of the claimant and meet with the corporate guardian to review investment strategy and performance. Some of a corporate Guardian's responsibilities include creating and managing an investment plan because often, a portion of the award is invested into a structured annuity and the balance is invested in the capital markets.

Courts are asked to consider the appointment of guardian fees for both corporate and individual guardians. Compensation for Guardians of Property, whether corporate or individual, are set out in statute and common-law. Section 40 of the *Substitute Decisions Act, 1992*, ("*Substitute Decisions Act*") provides as follows:

40. (1) A guardian of property or attorney of under a continuing power of attorney may take annual compensation from the property in accordance with the prescribed fee scale.⁴⁰

Regulation 26/95 made pursuant to the *Substitute Decisions Act* prescribes the applicable prescribed fee scale as follows:

1. For the purposes of subsection 40(1) of the Act, a guardian of property or any attorney under a continuing power of attorney shall be entitled, subject to an increase under subsection 40(3) of the Act or an adjustment pursuant to a passing of the guardian's or attorney's accounts under Section 42 of the Act, to compensation of,
 - (a) 3 per cent on capital and income receipts;
 - (b) 3 per cent on capital and income disbursements; and
 - (c) Three-fifths of 1 per cent on the annual average value of the assets as a care and management fee.⁴¹

Courts generally use the aforementioned formula as a starting point and then go on to incorporate 5 subjective criteria into the assessment of appropriate compensation on a case by case basis. These 5 criteria were first laid out in Re Toronto General Trusts Corporation and Central Ontario R.W. Co.⁴² as being 'fair and reasonable' and have since been applied by many Courts in determining a fair amount of compensation:

- The size of the trust;

⁴⁰ S.O. 1992, C. 30, as amended

⁴¹ O. Reg. 26/95 made pursuant to the *Substitute Decisions Act, Ibid*

⁴² [1905] O.J. No. 536

- The injuries and resulting care and responsibility involved as well as the lifespan of the claimant;
- The time required in performing the duties;
- The skill and ability shown; and
- The success resulting from the administration.⁴³

In addition to management fees, legal fees may be awarded for the management of the award, including legal fees for bringing the initial Guardianship Application, the regular passing of a Guardian's account, bringing motions to the Court for advice and direction, amending management and investment plans and the appointments of new Guardians, if required.

Where a structured settlement is used to invest the Plaintiff's pecuniary damages award, the Plaintiff's entitlement to a tax gross up and management fees is eliminated.

Recent Large Civil Damages Awards: Focus on Future Care Awards

Sandhu v Wellington Place

The largest personal injury damage award affirmed at the appellate level in Canada is the 2008 Ontario Court of Appeal decision of Sandhu (Litigation Guardian of) v Wellington Place Apartments⁴⁴ ("Sandhu"). The minor Plaintiff, Harvinder Sandhu fell from a fifth floor apartment building window and landed on the cement pavement below, resulting in catastrophic and permanent personal injuries and impairments including a severe brain injury. Harvinder was 2 years old at the time of the accident and 11 years old at the time of trial. Harvinder required 24-hour professional care and was not going to mentally develop beyond the age of 12, which placed a huge burden on his family. Furthermore, despite his injuries, Harvinder was not deemed to have a reduced life expectancy.

At the conclusion of the 2006 trial, the Jury awarded the Plaintiffs \$12,936,143 in damages. The total claim increased to nearly \$18,000,000 after taking into account pre-judgment interest and post-judgment interest, guardianship costs, management fees, disbursements and legal costs. An award of \$10,942,000 was allotted for Harvinder's future care, \$311,000 for Harvinder's pain and suffering, \$100,000 each to Harvinder's parents and brother pursuant to the *Family Law Act*⁴⁵ and \$1,166,283 for Harvinder's loss of future income.⁴⁶

⁴³ *Ibid.* at para. 23

⁴⁴ [2008] O.J. No. 1148

⁴⁵ *Family Law Act*, supra note 28

⁴⁶ *Sandhu*, supra note 44

Madam Justice Carolyn Horkins presided over the trial in Sandhu and after the Jury delivered its verdict, Madam Justice Horkins was asked to determine Harvinder's damage claim to cover the guardianship costs. Madam Justice Horkins awarded close to \$1,800,000 in Guardianship costs including \$268,000 for a non-corporate Guardian (based on 10 hours/week at \$15.00/hour), \$1,127,000 for a corporate Guardian and \$400,000 in legal fees.⁴⁷

The defence appealed many of the Jury and trial Judge's findings including the Jury's findings of awarding roughly \$1,336,000 more in future care than the \$9,605,000 suggested figure put forth by Plaintiffs' counsel during her closing argument. The defence argued that 'this higher amount was not based on any credible evidence or theory of compensatory damages for future care.'⁴⁸ However, the 3-panel Court of Appeal held that there was indeed evidence before the Jury from the Plaintiffs' experts testimony that, if accepted, would have resulted in a higher award than the highest future care scenario put forth by Plaintiffs' counsel during argument, which was for Harvinder to receive 24-hour/day at-home care for the rest of his natural life, at market rates for caregivers which included rehabilitation support workers and personal support workers, as well as many other rehabilitation providers. The Jury was asked to assign a figure for the cost of Harvinder's future care but were not asked to explain how they reached that figure.

Furthermore, the panel noted that the Plaintiffs actually underestimated the hourly rates of caregivers and rehabilitation support workers at \$10.00/hour and \$49.00/hour, respectively, whereas there was evidence from the Defendants' expert economist that the hourly rate charged by agencies employing these caregivers is \$24.00/hour and \$52.43/hour for rehabilitation support workers.⁴⁹ Had these hourly wage numbers been accurately put forth at trial, the resulting award for future care may have been in excess of that which was actually awarded. There was no obligation on the Jury to solely accept Plaintiff's counsel's suggested submissions on a future care scenario if there was evidence to prove that the actual cost of future care might be higher.⁵⁰

In the alternative, the defence argued that even if the individual awarded heads of damages were allowed to stand, their cumulative effect was too high. The Court of Appeal rejected this argument on the basis that each individually awarded head of damages was supported by evidence at trial.⁵¹

⁴⁷ [2006] O.J. No. 2448

⁴⁸ *Sandhu*, supra note 44 at para. 9

⁴⁹ *Ibid.* at para. 20

⁵⁰ *Ibid.* at para. 17

⁵¹ *Ibid.* at para. 50

Marcoccia v Gill

In the 2007 Jury trial case of Marcoccia (Litigation Guardian of) v Gill, the 20-year-old Plaintiff sustained catastrophic and permanent personal injuries and impairments as a result of a 2000 motor vehicle collision. At trial, Mr. Marcoccia's counsel argued that Mr. Marcoccia's frontal and temporal lobe impairments, left-sided hemi-paresis, prominent disinhibition, impulsivity and lack of insight into his own impairments left him unsuitable for assisted group home living and that he required instead 24-hour day/7-day week care for the duration of his lifetime. It was proposed that Mr. Marcoccia receive 8 hours/day of care from a rehabilitation support worker and 16 hours/day from an attendant care provider.

The medical evidence adduced and accepted by the Jury at trial was that the support of a rehabilitation support worker would be mandatory in order to help Mr. Marcoccia sustain relationship and move forward towards achieving even simple goals including queuing, reasoning and helping Mr. Marcoccia solve problems.

The defence presented various scenarios for Mr. Marcoccia's future care at trial, including that he be placed in a group home, which was deemed not appropriate for him as well that he use a Lifeline to call for assistance if needed, which would reduce the amount of hourly wage attendant care required. The Plaintiff's medical experts noted that although Mr. Marcoccia was capable of pushing a button, it would depend on his perception of danger and given the possibility of unpredictable emergency situations, he does not have the judgment necessary to make appropriate decisions, including pushing a button in an emergency.

The Jury awarded Mr. Marcoccia \$15,650,182 in damages, including \$13,953,064 for future care, which was an award of 96.3% of the future care cost claims presented to it during the trial.⁵² Mr. Justice Moore presided over the Jury trial and after the Jury delivered its verdict, he was asked to determine damages for the Plaintiff's Guardian of Property, what compensation ought to be awarded for the services rendered by a corporate co-guardian and what legal expenses ought to be awarded for the Plaintiff's estate. Mr. Marcoccia was awarded a total of \$1,267,816 (before apportionment for contributory negligence), including \$161,250 for the non-corporate Guardian's services, \$717,557 for the corporate Guardian's services and \$389,009 for related legal fees. In commenting on the Jury's award of future care costs, Mr. Justice Moore noted the following:

“Further, for the purposes of assessing future claims, the family must be taken out of the picture. As such, it must be assumed that Robert may not continue to live with his parents. The jury award may allow Robert to live in an apartment with attendant care, as

⁵² [2007] O.J. No. 1333

need. A family member may continue to act in a guardianship role but that will be very different than the multiple roles played to date by Mrs. Marcoccia as mother, housekeeper, cuing and prompting coach, behavior monitor and attendant.”⁵³

The damages award was reduced by the 39% contributory negligence apportioned to Mr. Marcoccia for the motor vehicle accident.⁵⁴

Morrison v Greig

Both Derek Gordon and Ryan Morrison were passengers in a motor vehicle operated by the Defendant who was impaired by alcohol at the time of a motor vehicle collision. Neither Mr. Gordon or Mr. Morrison, both aged 22 at the time, were wearing seatbelts at the time of the collision and both were thrown from the vehicle upon impact. As a result of the collision, Derek Gordon suffered a catastrophic brain injury and Ryan Morrison was rendered a paraplegic. They proceeded to trial together as against the Defendants in 2006.⁵⁵

Derek Gordon

At trial, the defense argued that a much lower level of attendant care ought to be considered (4 hours/day vs 24 hours/day) for Derek Gordon because he has some reluctance to accept assistance from caregivers and as a result, there is a likelihood that he will not accept the help that would be provided to him, thereby potentially wasting these funds.⁵⁶ Mr. Justice Glass did not agree with the defence’s position regarding attendant care and in his 2007 decision, he noted:

“Today, Derek receives attendant care assistance. The care is not a luxurious form of care. It is necessary. There is no likelihood that Derek will recover and have no need for this form of care. Acquired brain injury is permanent. It affects his frontal lobe. To suggest that the recommended attendant care be reduced significantly or abandoned completely simply passes the task over to the family in the sense of dumping such responsibility on them. There is no justification for doing so.”⁵⁷

Mr. Justice Glass accepted the Plaintiff’s cost projections for future care on the basis that they were reasonable and necessary and noted that the defence’s future care expert’s outlays appeared to focus on simply finding ways to reduce the dollars without consideration for the necessities that Mr. Gordon would require for the rest of his life. The defence suggested not only that Mr. Gordon

⁵³ *Ibid.* at para. 70

⁵⁴ [2008] O.J. No. 2272

⁵⁵ *Morrison*, Supra note 31

⁵⁶ *Ibid.* at para. 34

⁵⁷ *Ibid.* at para. 35

use an on-call service for any attendant care required during the night, thereby making the cost of nighttime attendant care 3 hours but also that any overnight attendant care could be provided by a moderately skilled caregiver at a slightly higher rate than minimum wage. Mr. Justice Glass did not accept these arguments:

“To take the approach of Lee Tasker (defense future care expert) would be to gut the reasonable care for the Plaintiff and transfer the cost and responsibility to his family. I am not persuaded that he will not take the services recommended by Ms. Bierbrier (Plaintiff’s future care expert); rather, I am satisfied that he will accept the help he needs....The services recommended by Ms. Bierbrier are essential and do not amount to a wish list for a severely injured person to live out the remainder of his life.”⁵⁸

With respect to the necessity of ensuring Mr. Gordon receive both attendant care and rehabilitation support worker services, Mr. Justice Glass noted:

“Ms. Bierbrier has a balance of rehabilitation support workers and attendant care service providers so that duplication does not occur... She does not expect a support worker to do the work of an attendant care service provider. The rehabilitative support worker’s responsibility is primarily to develop more community integration for the injured person. The individual oversees the activities of daily living. Often, people confuse the role of a rehabilitative support worker and a personal support worker. The latter has less training. The rehabilitative support worker works with the treatment team for the patient.”⁵⁹

Justice Glass awarded Derek Gordon \$12,606,198 in damages including \$8,646,900 for future care (taking into account the discount rates pursuant to the *Rules of Civil Procedure*)⁶⁰ plus a management fee of \$525,925.⁶¹ All of these figures were to be reduced on account of Derek Gordon’s contributory negligence for failing to wear a seatbelt on a percentage as agreed upon between the parties (percentage not disclosed).⁶²

The defence sought to reduce the attendant care award by 20% on the basis that the Plaintiff would not use the proposed goods and services, however, the Court refused to accept this proposition based on expert testimony that he required these goods and services.⁶³ The Court noted that the Plaintiff ought to be

⁵⁸ *Ibid.* at para. 53

⁵⁹ *Ibid.* at para. 55

⁶⁰ *Rules of Civil Procedure*, supra note 28

⁶¹ *Morrison*, supra note 16 at para. 79

⁶² *Ibid.* at para. 87

⁶³ *Ibid.* at para. 77

awarded what he would require in care whether or not he wanted it. The Court also noted that this award would permit the Plaintiff to live with dignity.

Ryan Morrison

Ryan Morrison underwent stem cell surgery in Portugal so that he might be more able to walk again, following which, he attended an intensive rehabilitation program in Michigan. Mr. Justice Glass concluded that undertaking stem cell surgery was a reasonable medical procedure that was not available in Ontario and which had a substantial possibility of success and therefore awarded Mr. Morrison the cost associated with the procedure.⁶⁴

Mr. Justice Glass accepted the Plaintiff's future care expert's recommendation that he would require help from people in the future who are more than unskilled persons and minimum wage earners. As previously noted, Mr. Justice Glass did not agree with the defence's proposition that the use of a Lifeline was appropriate for the Plaintiff during the night:

"The defence has suggested that a service could be on call arriving within about a half an hour of a call for assistance. Ms. McCarthy from Service Comfort Keepers testified that his company can supply personal support workers who can attend on call, who can be present in the residence either as an awake person throughout the night or as a person who can go to sleep during the night at the residence of the patient. The time to come to the residence to assist Mr. Morrison would be a half hour following a call to a life line centre. The life line centre would then have to call his company. The cost is \$23 per hour with a minimum charge of 3 hours time per call. Ms. McCarthy did not have any information about whether or not the personal support workers from her company had any skills to work with spinal cord injury persons. This approach by the defence with the opinions of Lee Tasker appears to be shortsighted. If this Plaintiff were to be living on his own and did not have 24-hour a day attendant care, he would be at risk of not having an emergency addressed quickly. For example, if there were a fire and it was going to take a personal care worker half an hour to come to his residence, the Plaintiff might die in the meantime. This Plaintiff is not one who only needs a nanny to pick up after him. He needs someone who can be there right away and someone who understands the limitations of a spinal cord injured person so that he can be assisted properly."⁶⁵

Mr. Justice Glass evaluated the Plaintiff and defence future care expert's future care cost models and preferred the Plaintiff's expert's model of dividing Mr.

⁶⁴ *Ibid.* at para. 111

⁶⁵ *Ibid.* at para. 125

Morrison's life into the following 3 time periods rather than the defense expert's 'family therapy model' of dividing Mr. Morrison's life into 13 stages, including marriage:

- From the time of trial to the expected time Mr. Morrison would move out of his parents home;
- For 20 years after that, until the Mr. Morrison attained 41 years of age;
- From 41 years old to the remainder of Mr. Morrison's life.⁶⁶

Mr. Justice Glass noted that the defence's theory of Mr. Morrison's future care costs assumed Mr. Morrison would marry, however, he noted that a paraplegic person, such as Mr. Morrison has little likelihood of being employed and would have considerable pressure in his marriage. Mr. Justice Glass noted the importance of not relying on one particular future care cost model and rather, to consider the individual involved. The defence's expert did not actually meet Mr. Morrison and this was a significant disadvantage in seeking the Court's reliance upon the defence's report.⁶⁷

Ryan Morrison was awarded damages in the amount of \$11,519,525 including \$8,800,800 for future care, plus \$374,800 for housing for the rest of Mr. Morrison's life, plus a management fee of 4%, or, \$447,164.⁶⁸ All of these figures were to be reduced on account of Mr. Morrison's contributory negligence for failing to wear a seatbelt on a percentage as agreed upon between the parties (percentage not disclosed).⁶⁹

Aberdeen v Township of Langley

The Ontario courts are not the only provinces' Courts accepting Plaintiffs' large future care cost damages submissions. In the 2007 British Columbia trial decision of Aberdeen v Township of Langley, Mr. Justice Groves awarded future care costs in the amount of \$4,151,504 to the Plaintiff.⁷⁰ The Plaintiff was riding his bicycle upon a roadway when the Defendant's motor vehicle crossed over the yellow line, causing the Plaintiff to swerve off the roadway and encounter gravel which caused him to be propelled against the metal guardrail and suffer a spinal cord injury. There was no contributory negligence found upon the Plaintiff.⁷¹

As a starting point in assessing the Plaintiff's future care costs, Mr. Justice Groves reviewed Andrews in noting that the divergence between the Plaintiff and Defendants' future care costs centers around what is required to make 'full compensation' to the Plaintiff. Mr. Justice Groves noted that although Andrews

⁶⁶ *Ibid.* at paras. 132, 140 - 142

⁶⁷ *Ibid.* at para. 146

⁶⁸ *Ibid.* at para 182

⁶⁹ *Ibid.* at para. 189

⁷⁰ [2007] B.C.J. No. 1515

⁷¹ *Ibid.* at para. 25

affirmed the idea of ‘full compensation’ for pecuniary losses, including the costs of future care, there have been cases since that state full compensation should not be given, only compensation that is ‘fair and reasonable’, however, Mr. Justice Groves concluded:

“Andrews clearly stated that full compensation was to be made for pecuniary injury, and Plaintiffs were not to make do with a lesser standard of care in order to save defendants money.”⁷²

Mr. Justice Groves went on in detail to describe some of the earlier English authorities on *restitution in integrum* and noted that Andrews did not necessarily fully resolve the issue of what standard of future care is required to provide ‘full compensation’. The Plaintiff was urging the Court to accept a functional approach to replacing what had been lost to make full compensation while the Defendant was urging the Court to accept a medical justification approach to urge that awards not be made for items that the Plaintiff was unlikely to use or that were experimental. Mr. Justice Groves noted that Andrews did not address how a choice is to be made between acceptable alternatives in order to make ‘full compensation’. Mr. Justice Groves concluded his analysis of the Plaintiff’s future care costs on the basis of medical justification rather medical necessity:

“I have concluded that full compensation as espoused in Andrews and Milina requires that there should be medical justification for a cost of future care expense and the expense must be reasonable. As I noted, the inquiry is more directed to the fact-based determination of whether each individual item claimed for a cost of future care expense is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the Plaintiff whole again. I have rejected any suggestions that medical necessity is a test; rather, it is one of medical justification.”⁷³

Mr. Justice Groves accepted the majority of the Plaintiff’s future care expert’s submissions and awarded the Plaintiff \$4,151,504 in future care costs plus \$388,639 for the replacement of the Plaintiff’s house.⁷⁴

The Defendants appealed both the finding that the Plaintiff was not contributorily negligent and the quantum of damages for future care costs.⁷⁵ One of the defence’s submissions on appeal was that the highest previous award for future care costs given to a 16-year old paraplegic Plaintiff prior to this case was \$1,210,000, Mr. Aberdeen was 50 years of age at the time of his injury.⁷⁶

⁷² *Ibid* at para 84

⁷³ *Ibid.* at para. 198

⁷⁴ *Ibid.* at paras. 219 and 234

⁷⁵ [2008] B.C.J. No. 2010

⁷⁶ *Ibid.* at para. 61

Although, in a decision released in October 2008, the British Columbia Court of Appeal remitted the issue of contributory negligence for retrial, the Court found no basis upon which to interfere with the trial Judge's award for future care costs and dismissed this ground of appeal.⁷⁷

Conclusion

Given the Supreme Court of Canada's cap on non-pecuniary damages of \$100,000 plus a Cost of Living Allowance,⁷⁸ which currently maximizes this award out at \$326,244 (January 2009 statistic)⁷⁹, Plaintiffs in catastrophic injury cases are often entitled to the capped maximum. If the evidence adduced from experts establishes that future care is reasonably necessary to preserve the Plaintiff's health and this care is proved to cost millions of dollars, the Courts have been more than willing to award millions in future care.

The analysis as set out by the Supreme Court of Canada in Andrews requires the application of the principle of *restitutio in integrum*, in so far as that is possible to achieve "full compensation" rather than 'minimal' or 'marginal' compensation.⁸⁰ The principle of full compensation for future care is recognized as being a response, in part, to the arbitrary limit placed on non-pecuniary damages.

The implication of these cases is that damage awards in a case involving a catastrophically injured claimant can reach upwards of \$20,000,000. However, many individuals are still only buying motor vehicle liability policies with third party coverage of \$1,000,000. Counsel ought to carefully consider the prospects of adding all appropriate Defendants to a claim in order to extend the insurance limits available to a catastrophically injured claimant. For example, if the negligent driver of the vehicle is insured under another policy than the owner's, s.277 of the *Insurance Act*⁸¹ provides that this second policy stacks on top of the owner's policy.

At mediation there are opportunities for defence counsel to settle catastrophic injury claims with the benefit of impairment ratings offered by structured costs of future care. Depending upon the available policy limits, there may be the opportunity for defence counsel to settle cases potentially without having responsibility to pay gross-up or management fees where policy limits are insufficient, so long as a structured settlement is agreeable.

⁷⁷ *Ibid.* at para. 64

⁷⁸ The cap on non-pecuniary damages became law in Canada as a result of the 1978 trilogy of Supreme Court of Canada decisions in *Andrews*, *supra* note 5, *Teno v Arnold* [1978] S.C.J. No. 8 and *Thornton v Prince George School District No. 57* [1978] S.C.J. No. 7.

⁷⁹ Statistics for Litigators obtained from Chartered Accountants Rich Rotstein & Associates at www.richrotstein.com

⁸⁰ *Andrews*, *supra* note 5

⁸¹ *Insurance Act*, *Supra* note 34

At mediation, defence counsel have the opportunity of settling claims within policy limits and avoiding the inevitable offer which is above policy limits and which, if exceeded at trial, presents the real concern about a pending “bad faith” claim against the insurer.

By recognizing that Judges and Juries are comfortable in applying the “real or substantial risk” test to determine appropriate future care costs awards, and helping insurer clients adjust reserves appropriately to address a “real possibility” rather than a “balance of probability” evaluation of future care needs, defence counsel will help mediations to continue to serve as useful opportunities for resolution of these severe injury claims.

David F. MacDonald

Thomson, Rogers
Barrister & Solicitor
390 Bay Street
Suite 3100
Toronto, Ontario
M5H 1W2

Telephone: 416-868-3155
Fax: 416-868-3134

Adrienne M. Kirsh

Thomson, Rogers
Barrister & Solicitor
390 Bay Street
Suite 3100
Toronto, Ontario
M5H 1W2

Telephone: 416-868-3168
Fax: 416-868-3134