THE COURT'S APPROACH TO EVALUATING FUTURE CARE[1]

When prosecuting or defending a serious personal injury case, many of us are beholden to the expert opinions that we receive from a variety of health care professionals. Surprisingly, many of these professionals are completely unfamiliar with the Court's approach to evaluating future care entitlements. Below, I have briefly summarized some of the relevant authorities that address the Court's mandate and/or approach to past and future care (from a Plaintiff's perspective).

In *Andrews v Grand & Toy Alberta Limited* (1978), 83 D.L.R. (3d) 452 @ 461 (S.C.C.), Dickson J. confirmed that "full compensation" is the paramount concern of the Courts in cases of severely injured victims.

Professor Cooper-Stephenson emphasizes this view in his text, Personal Injury Damages in Canada (2nd Edition 1996, Carswell) at Page 411:

> The full compensation thesis established in the trilogy has been used over and over as a background principle to justify the provision of home care for seriously disabled Plaintiffs. The general approach was affirmed by McLaughlin J. in *Watkins v Olafson*, where she stated that the trial Judge's conclusion on the need for home care was "in conformity with the emphasis on full and adequate compensation for seriously injured Plaintiffs expressed by this court in *Andrews*…
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> She reasserted the pre-eminence of the compensatory principle in *Ratych v Bloomer*, stating that "the Plaintiff is to be given damages for the full measure of his loss as best as can be calculated".

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The principle of full compensation for future care is also recognized as being a response, in part, to the arbitrary limit placed on non-pecuniary damages. In his text, The Law of Damages, Professor Waddams (Loose-leaf Edition, Canada Law Book, 1999, paragraphs 3-63) states:

> The tenor of Dickson J.'s Judgment in *Andrews v Grand & Toy*, makes it clear that the court will lean in favour of the Plaintiff in judging the reasonableness of his claim. The court made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for ensuring the adequacy of pecuniary compensation.

The Trilogy does not speak of "minimal", "lowest standard", or "marginal" compensation. The authorities support awards of compensation that will provide a high standard of future care for injured Plaintiffs. Professor Cooper-Stephenson has described the standard of care in this manner:

> The establishment of this very high standard of post-accident care means that Plaintiffs can claim almost any anticipated expenses that will facilitate their health, including both their physical and mental welfare.

Professor Cooper-Stephenson goes on to say:

> The standard of future care to which an injured Plaintiff is entitled is higher than that normally provided under statutory compensation and rehabilitation schemes.

As stated by Dickson J. in *Andrews*:

> What a legislature sees fit to provide in the cases of veterans and in the cases of injured workers and the elderly is only of marginal assistance. The standard to be applied…is not merely "provision", but "compensation", i.e. what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured?

The comparison between the standard of care afforded to successful tort victims and others was also commented upon by Mr. Justice Wright in *Watkins v Olafson.* Mr. Justice Wright provides:

> There are of course those who suffer severe disability who do not have a right of recovery against anyone. These people are in a different category and of course do not have the same opportunity to be free of government care programs.

It is clear that a Defendant cannot successfully argue that the damages for future cost of care should be reduced because of the available of voluntary assistance to the Plaintiff from relatives or friends. As noted by Dickson J. in *Andrews*:

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

In *Brennan v Singh*, 1999 Carswell BC 494 (S.C.), Mr. Justice Harvey squarely addressed a wife's claim for past services rendered to her injured husband. Harvey J. provides:

> It is useful to review briefly the factors which are considered in the assessment of such claims. They are:
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> (a) Where the services replace services necessary for the care of the Plaintiff.
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> (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.
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> (c) Quantification should reflect the true and reasonable value of the services performed, taking into account the time, quality and nature of these 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.

(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.

As noted by Professor Cooper-Stephenson:

> For the most part, however, a future cost of care award in respect of voluntary services by family and friends should replicate what would have to be paid in the market for services with the same quality and character.

The cases by and large take this approach, often by ignoring the possibility of personal voluntary care and therefore assessing the market cost for these services.

The defence may try to minimize the future care costs by arguing that the Plaintiffs should "get by" with less than full compensation. It may try to pass off the responsibility of the Defendant to provide appropriate future care by suggesting that the Plaintiff can rely on the gratuitous support of family members. In the absence of family support, the defence may argue that the Plaintiff can "make do" with government subsidized programs. While clearly this cheaper approach to future care may benefit the Defendant, it is not what the law provides. In the words of Dickson J. in *Andrews*:

Justice requires something better.

All of which is respectfully submitted:

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