THE USE OF PEDIATRIC LIFE CARE PLANS PRIOR TO TRIAL AND BEYOND

SEPTEMBER 8, 2011

STACEY L. STEVENS, Partner
Thomson, Rogers
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

416-868-3186
sstevens@thomsonrogers.com

L. CRAIG BROWN, Partner
Thomson, Rogers
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

416-868-3163
cbrown@thomsonrogers.com

Pediatric Life Care Plans: Prior to Trial and Beyond

A comprehensive balanced Life Care Plan ("Plan") is one of the most important reports in a pediatric brain injury case as it is quite often the largest economic component of the claim. A properly developed Life Care Plan must be based on the treatment team predicting the child's future care needs at a time when the full impact of the brain injury may not be known. With predictions hand, the Life Care Planner creates a detailed analysis of the type, quantity, timing and cost of the child's current and future care needs. In the end, the Plan must be a fair and balanced collaborative document based on a strong foundation of treating and expert evidence which can be relied on to either facilitate settlement or persuade a jury to award significant damages.

The need for a Life Care Plan does not end with a settlement or verdict. In cases where the child (or young adult) has a severe brain injury, the Court must approve the settlement. Further, where that person lacks capacity, it must also appoint a Guardian of Property. At this stage, a post-settlement Life Care Plan is required that revisits the child's care needs in light of the actual amount of money available.

This paper will review the need for the treatment team's participation in preparing the Life Care Plan, explain the burden of proof that must be met for future recommendations and discuss the need for a post-settlement Life Care Plans during the settlement approval and guardianship process.

The Role of the Treatment Team in Preparing the Life Care Plan

Although the Life Care Plan is prepared by a Certified Life Care Planner members of the treatment team must provide independent support for all of the recommendations. The role of the Life Care Planner is to collect and review all of the medical and rehabilitation records. He/she must provide a complete summary of the child's injuries, the treatment provided to date and by whom, the results of any investigations and tests along with the

various opinions relating to diagnosis and prognosis. Taken together, this information forms the foundation for the future care recommendations and costing. Failure to prepare a Life Care Plan without the independent support of the child's treatment team risks the Plan being given less weight by opposing Counsel and may lead to the Life Care Planner's credibility being called into question at Trial.

The decision of Justice Moore in *Song v. Hong*[1] illustrates the importance of ensuring the treatment team supports the recommendations in the Plan. In *Song,* the Plaintiff's counsel sought to introduce evidence from three witnesses regarding Ms. Song's future care needs. Defence counsel challenged their testimony, in part, because the witnesses' recommendations may not have reflected Ms. Song's life in Korea and were informed by hearsay evidence. Although each of the witnesses met with various medical and rehabilitation specialists in Korea to discuss Ms. Song's needs there was never any opinion evidence for same delivered by the Korean specialists. Justice Moore was quick to point out that the proposed witnesses were not doctors and in fact, they did nothing more than interview medical specialists in order to form their opinions; something he felt *"any member of the jury may be have been equally capable of doing".* Having said that, he also recognized that certain portions of their evidence was based on reliable facts properly before the Court. In the end, Justice Moore allowed the witnesses to testify subject to certain conditions which negatively impacted whether their recommendations could be accepted.

More recently, the Ontario Court of Appeal in *Degennaro v. Oakville Trafalgar Memorial Hospital*[2] reviewed the trial Judge's future care award of $1.7 million. At trial, evidence of future care was entered by filing the Life Care Planner's report as part of the Plaintiff's Document Brief. No witnesses were called to give evidence with respect to or in support of the future care recommendations. On appeal, the court determined the report contained several unsubstantiated claims and claims based on hearsay. The

[1] *Song v. Hong,* 2008 CanLII 10056 (ON SC).
[2] *Degennaro v. Oakville Trafalgar Memorial Hospital et al,* 2011 ONCA 319 (CanLII).

court went on to conclude there was insufficient evidence to support all of the future care recommendations and reduced the award by $374,640.65.

The lesson to be learned from *Song* and *Degennaro* is there must be independent evidence from a medical doctor or health care provider for the future care recommendations to be properly before the Court. Without this evidence, there is a risk that all or part of the Life Care Plan will be rejected and any damages awarded will reflect the Plan's shortcomings.

From a best practice perspective, a Life Care Planner should become involved in the case as early as possible and should attend all team meetings. Where the Life Care Planner is retained later in the process, the case manager should arrange a meeting so the Life Care Planner can meet with the treatment team, family and educators so he/she may have the benefit of an in depth discussion regarding the child's injuries and past & present needs.

Quite often, the Life Care Planner will mail the Plan to the treatment team with a cover letter asking for his/her support. While this can be a cost-effective approach to gathering the team's support, the Life Care Planner runs the substantial risk of either receiving no response or a letter that rejects the recommendations. At this point, it is difficult, if not impossible, to obtain a different opinion.

The Burden of Proof When Making Future Recommendations

The development of a child's brain is not static. It grows in leaps and spurts as it passes through the five neuro-developmental stages between birth and 21 years. During this time, new cognitive, behavioral and motor deficits often emerge.

For these reasons, it is understandable for health care practitioners to be very hesitant when a Counsel or a Life Care Planner asks them to identify what a child's future care needs will be ten or twenty years from now. It is not unusual for us to be faced with the question: *"how can I begin to identify the child's needs when I cannot be certain what*

those needs will be or when the will need will occur". The answer is simple: the burden of proof for future recommendations is based on whether there is "*a real and substantial possibility*" the need will occur rather than the higher "*balance of probabilities*" standard.

In *Schrump v. Koot*[3]*,* the Ontario Court of Appeal undertook a comparison of the burden of proof required to establish whether or not the Plaintiff would require future surgery. The Plaintiff's expert predicted a 25-50% chance of the need occurring. In contrast the Defendant's expert opined that the need for future surgery was remote. At trial, the Plaintiff was awarded future care costs relating to the future surgery. On appeal, the Defendant argued that only probable developments not possible developments should be taken into account when assessing damages. The Court of Appeal rejected the Defendant's argument and in doing so, summarized the burden of proof required to establish an event occurred versus an event that may occur in the future as follows:

> *When the question is whether a certain thing is or is not true — whether a certain event did or did not happen — then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.*
>
> *In assessing damages for personal injuries the award may cover not only all injuries actually suffered and disabilities proved as of the date of trial, but also the 'risk' or 'likelihood' of future developments attributable to such injuries. It is not the law that a plaintiff must prove on a balance of probabilities the probability of future damage; he may be compensated if he proves in accordance with the degree of proof required in civil matters that there is a possibility or a danger of some adverse future development.*

This does not mean the health care practitioner is restricted from making recommendations based on a "balance of probabilities". Where possible, it is preferable the health care practitioner rely on the "balance of probabilities" standard rather than a "real and substantial possibility" in order to avoid the Trial Judge translating the real and

[3] *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.)

substantial possibility into a percentage figure and adjust the damages assessment accordingly[4].

When Should a Life Care Plan be Prepared?

There are at least two occasions when a pediatric Life Care Plan should be prepared. An initial comprehensive Life Care Plan is prepared during the litigation or *Statutory Accident Benefits* claim and usually when Counsel is getting ready for a settlement meeting or mediation. It may be necessary to update the Plan as the case gets closer to Trial.

A second "post-settlement" Plan should be prepared after the matter has ended. The "post-settlement" Plan is a focused & condensed version of the comprehensive Plan. It is a snap-shot of the actual services that will be provided to the child from that point forward and the actual cost of same. The purpose of the "post-settlement" Plan is to identify the level of service the child needs to maintain his/her quality of life within the parameters of what he/she can afford and keeping in mind, the money has to last a lifetime. This Plan is filed with the Court in support of the Motion to approve the settlement and appoint a Guardian of Property.

Rule 7 of the *Rules of Civil Procedure* requires the Court to approve all awards, whether by settlement or at trial, made on behalf of "persons under disability". "Persons under disability" includes children and mentally incapable people. Rule 7 ensures the best interests of the child or mentally incapable person are protected. In doing so, the Court reviews the settlement and approves who will manage the settlement funds, how they will be invested, the funds will be spent and on what.

The appointment of a Guardian of Property occurs in cases were a child or young adult has suffered a severe brain injury and lacks the ability to manage their own finances. In

[4] *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont.C.A.)

this instance a person, usually a family member acting alone or in conjunction with a financial institution, is appointed the child's Guardian of Property and is entrusted with the responsibility of managing the settlement funds. The proposed Guardian must file a Management Plan as part of the Application before the Court. The Management Plan is complete listing of the child's assets & liabilities together with a detailed plan as how the proposed Guardian intends to use the child's resources to best further his/her well-being.

There is a temptation to rely on the comprehensive Plan at this stage however, in our opinion, this is not advisable. The initial Plan makes recommendations without regard for how much money is available to meet those needs. Once the matter has been settled, the amount of money actually available to the child has been defined and it becomes apparent that many of the services recommended are simply going to be unaffordable if the comprehensive Plan is followed. Further, the Management Plan not only requires a list of services that will be implemented but also requires the proposed Guardian to identify any recommended services that are not being implemented and explain why. The post-settlement Life Care Plan is the appropriate vehicle for prioritizing care needs, providing the Court with the medical support needed to justify a deviation from the comprehensive Plan and avoid having a Judge, the Children's Lawyer or the Public Guardian send everyone "back to the drawing board". In short, a post-settlement Life Care Plan identifies the key recommendations that are in the child's best interest, maintains and/or improves his/her quality of life while at the same time maximizing the funds available. Like its predecessor, this Plan is one of the most important documents in the Settlement Approval and Guardianship Application.

Understanding Guardianship

The appointment of a Guardian is a significant step as it strips the person of his/her right to make their own decisions. This does not transfer ownership of the person's property but rather passes over his/her decision making powers to the Guardian. Accordingly, there must be clear and convincing evidence of incapacity before the Court will take this

step. The fact that the injured child has a brain injury is not enough to reach a finding of incapacity.

There are two Government agencies in Ontario whose role is to safeguard the legal, personal and financial interests of minors and mentally incapable people. The Office the Children's Lawyer is responsible for looking after the interests of minors. The Office of the Public Guardian and Trustee looks after the interests of individuals who are over the age of 18.

In law, there is a presumption that a child under 18 is fundamentally incapable of managing his/her own finances. Normally, a parent is the informal Guardian of Property however, where there is a large amount of money involved or the child's incompetence will continue past the age of majority, the Court will generally require an Application be made to the Office of the Children's Lawyer for the appointment of a Guardian of Property. The application should detail what arrangements will be made to have the child assessed by a Certified Capacity Assessor[5] before reaching the age of majority and for the re-appointment of the Guardian through the Office of the Public Guardian and Trustee as the child will be presumed capable once he/she turns 18 pursuant to Section 2(1) of the *Substitute Decisions Act.*

Section 2(1) of the *Substitute Decisions Act, 1992* (the "SDA") presumes that anyone who is 18 years of age or more is capable of making decisions on their own behalf. This presumption is overridden where a finding of incapacity has been made pursuant to section 6 of the SDA. Section 6 defines the incapacity to manage property as follows:

> *A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property or is not able to appreciate the reasonably foreseeable consequences of a decision or lack thereof*[6]**.**

[5] A list of Certified Capacity Assessors is attached at **Tab "6A"** to this paper.
[6] Section 45 of the SDA provides a similar test for a finding of incapacity for personal care. The person must be incapable of understanding information that is relevant to making a decision concerning his or her own health care,

Although a plain reading of Section 6 suggests that either branch of the test can be met in order to find incapacity, the Ministry of Attorney General requires Capacity Assessors to find the person meets both branches of the test in order to avoid a finding of incapacity[7]. A finding of incapacity requires more than just evidence that the person makes poorly informed decisions or decisions that are foolish or risky but rather there must be evidence that the choices made are the products of an impaired decision making process. This may include a demonstrated pattern of:

1. *Delusions or hallucinations which will likely materially affect the patient's understanding and management of finances.*
2. *A lack of orientation to time, place and person.*
3. *An inability to keep track of financial matters and decisions made.*
4. *Insufficient calculating abilities given the circumstances.*
5. *Specific thought process deficits that give rise to the conclusion that deficits in financial judgment also exist.*
6. *An impaired ability to learn the skills necessary to make the sort of decision required in an estate of the size, nature and complexity that he or she possesses.*

In certain circumstances, even if the person is capable of handling basic consumer transactions and can manage small amounts of spending money, a finding of incapacity may be made if that person is easily confused or taken advantage of by others[8].

Suffice it to say, that in all cases, the nature and degree of the alleged incapacity must be severe enough to warrant the Court's depriving the person of his/her right to live as he/she chooses[9].

---

nutrition, shelter, clothing, hygiene or safety or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

[7] Guidelines for Conducting Assessments of Capacity, Ministry of Attorney General May 2005. Also see *M.(Re), 2005 CanLII 57786 (ON CCB)*

[8] *Lazaroff v. Lazaroff, 2005 CanLII 44834 (ON SC).*

[9] *Re Koch, 1997 CanLII 12138 (ON S.C.), (1999) 33 O.R. (3d), 485.*

The Guardianship Application

Once the person has been found to be incapable a Guardianship Application must be served on that person, his/her family members and either the Office of the Childrens' Lawyer or the Public Guardian & Trustee. Further, the proposed Guardian must prepare a comprehensive Management Plan which details how the incapable person's money will be spent. The Guardian will rely on the post-settlement Plan as the foundation for what services are being put in place or left out and why. Once appointed, the Guardian will be required to maintain detailed records of the incapable person's assets, liabilities and all transactions made on that person's behalf. He/she will be required to periodically "pass accounts" before the Court, the Children's Lawyer or the Public Guardian to ensure the incapable person's finances are being managed appropriately.

Anyone can bring a Guardianship Application ("Application") except a person who provides health care, residential, social, training or support services to the incapable person for compensation unless that person is the spouse, partner, relative or attorney of incapable person. The Application can propose the appointment of a single or joint guardian. Alternatively, it may be preferable to appoint a bank or trust company to act as the Guardian where the incapable person has significant assets or there is no one willing to take on this role. Quite often, families will bring the Application jointly with a bank or trust company in order to alleviate them of the onerous record keeping requirements. In all circumstances, the PGT is the Guardian of last resort and will not be appointed unless the incapable person is at extreme risk due to self-neglect, financial exploitation or there is no other appropriate solution[10]. The Application and accompanying documents must be served on the spouse of the incapable person, all their children over the age of 18 years, brothers and sisters over the age of 18 years old and the person's parents unless those persons consent to the Application and waive their right to service.

[10] Section 24 of the *Substitute Decisions Act,* R.S.O. 1992, S.O. 1992 c.30.

The following factors will be taken into consideration by the Court and the PGT when appointing a Guardian:

1. *Whether the proposed guardian is the attorney under a continuing power of attorney.*

2. *The incapable person's current wishes if they can be ascertained.*

3. *The closeness of the relationship of the applicant to the incapable person and if the applicant is not the proposed guardian, the closeness of the relationship to the proposed guardian to the incapable person.*

4. *The proposed guardian's financial circumstances and credit worthiness.*

5. *The proposed guardian's level of experience in managing large amounts of money and making investment decisions.*

The Court can require the proposed Guardian to post security if it has concerns regarding suitability of the applicant or if the applicant lives out of province.

The Management Plan

The key component of the Application is the Management Plan. The Management Plan is complete listing of the incapable person's income, expenses, assets and liabilities together with a plan as to how the proposed Guardian will manage the incapable person's assets. This requires the Guardian to describe in detail, the level of medical and rehabilitation services that will be provided going forward, the anticipated cost of these services, an explanation as to how these services will benefit the incapable person and a summary of recommended services that are not being provided along with justification for same. A sample Management Plan is attached at Tab "6B". In all cases, the Court, the Children's Lawyer or the Public Guardian will measure the proposed Management Plan by whether the level of goods and services set out in the post-settlement Life Care Plan will improve the incapable person's quality of life or at the very least maintain his/her level of comfort and independence.

Conclusion

A comprehensive Plan is the heart and soul of a pediatric personal injury claim. It takes a significant amount of time and effort for the treatment team and Life Care Planner to develop a Plan that addresses all of the issues that need to be addressed. A Life Care Planner or health professional should never hesitate to call the individual's Counsel to discuss a particular legal issue or request a meeting with the family as it is imperative every member of the team's reports are ones that can be stood behind with a strong degree of confidence regardless of whether the report is prepared for trial, settlement approval or as part of the Guardianship process.

STACEY L. STEVENS, Partner
Thomson, Rogers
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

416-868-3186
sstevens@thomsonrogers.com

L. CRAIG BROWN, Partner
Thomson, Rogers
Suite 3100
390 Bay Street
Toronto, Ontario
M5H 1W2

416-868-3163
cbrown@thomsonrogers.com