FUTURE CARE COSTS: PREPARATION AND MITIGATION

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Introduction

In recent years there have been a number of developments in the law which have given rise to escalating damage awards. The focus of this paper is on the changes that have occurred with respect to:

I. Future Care Costs;

II. Guardianship and Management Fees; and

III. Risk Premiums.

I. Future Care Costs

1. Overview of Claims for Future Care Costs

Plaintiffs in personal injury cases will frequently claim for future care costs. Such costs may include, but are not limited to, things such as:

- Living costs if the person must be placed in an institution;
- Modification of their home or vehicle;
- Caregiver or other home maintenance services;
- Special transportation needs;
- Drug costs; and
- Uninsured healthcare services (e.g. physiotherapy, acupuncture, massage, chiropractic treatment).

The difficulty in assessing the quantum of such damages lies in the fact that they are not known with certainty at the time of trial (or settlement). Such costs are really "contingencies" in that the plaintiff may or may not require them. For example, the plaintiff's condition may worsen over time and as a result they may incur increased expenses, or they may recover and face diminished expenses over time. Alternatively, the plaintiff may spend long periods in the hospital and not incur expenses during that time.

2. Calculation of Future Cost of Care Awards - *Schrump v. Koot*

The Court of Appeal for Ontario's decision in *Schrump v. Koot* is often cited for the Court's analysis on assessing damages for future care.[129] This was an appeal by the defendants from a judgment awarding one of the plaintiffs $20,000 for a severe back injury resulting from a motor

[129] *Shrump v Koot*,82 DLR (3d) 553, [1977] OJ No 2502 (CA).

vehicle accident. The issue on appeal concerned the trial judge's failure to direct the jury to disregard the possibility of the plaintiff requiring future surgery. At trial, the plaintiff's expert testified there was a 25 to 50 per cent probability of future problems necessitating surgery. Unsurprisingly, the defendant's expert felt that the possibility of future surgery was very remote. The appellants contended personal injuries damages are to make allowance for probable future developments but are to exclude the possibilities.

The appeal was ultimately denied, but in doing so the Court set out the following guiding principles:

- Though it may be necessary for a plaintiff to prove on the balance of probabilities that the tortious act or omission was the cause of the harm suffered, it is not necessary for him to prove that future care loss or damage will occur, **but only that there is a reasonable chance of such loss or damage occurring.**[130]

- Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such **expert or cogent** evidence must be considered.

- This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable.

- Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be **substantial and not speculative**: they may tend to increase or reduce the award in a proper case.

a) Escalating Costs Associated with Future Care

There have been a number of cases recently in which plaintiffs have been awarded large amounts for costs associated with future care. Four recent examples are:

1. *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*:[131]
   - Jury Trial;
   - Two-year-old boy who fell from a fifth-storey apartment window;
   - Awarded $13 million in damages and interest;
   - Almost $11 million was awarded for future care for the severely brain-injured; plaintiff, whose life expectancy was determined *not* to be diminished by his injuries;
   - The case was later affirmed by the Court of Appeal for Ontario in 2008.[132]

2. *Morrison and Gordan v. Greig*:[133]

[130] The same analysis applies to the "crumbling skull" principle, highlighted in the causation paper also contained in this booklet. See e.g. *Rezaei v Piedade*, 2012 BCSC 1782, [2012] BCJ No 2499.
[131] *Sandhu (Litigation Guardian of) v Wellington Place Apartments*,[2006] OJ No 2448, 149 ACWS (3d) 572 (Sup Ct).
[132] *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2008 ONCA 215, [2008] OJ No 1148 leave to appeal to the SCC dismissed, [2008] SCCA No 261.
[133] *Morrison and Gordon v Grieg*,[2007] OJ No 225, 44 CCLT (3d) 212 (Sup Ct).

- Two young men catastrophically injured in a motor vehicle accident;
- Morrison awarded $8,880,000 for future care, plus $374,800 for housing;
- Gordon awarded $8,646,900 for future care;
- Judge refused to reduce any portion on the basis that the Plaintiff would not use the proposed goods or services (defence sought 20% reduction);

3. *Marcoccia v. Gill*:[134]
   - Jury trial;
   - MVA in which the Plaintiff suffered traumatic brain injury which would requireintensive lifelong care;
   - Awarded $14 million for costs of future care.

4. *MacNeil (Litigation Guardian of) v. Bryan*:[135]
   - The defendant drove through a stop sign into a ditch causing a catastrophic brain injury to a 15-year-old passenger in the backseat;
   - Justice Howden awarded damages to the plaintiff in the amount of $18.4 million dollars, $15 million of which was allocated to future care.
   - The award included 16 hours of basic supervisory care a day for the rest of the plaintiff's life from a personal support worker which alone totalled $4.5 million.

b) Why are Costs Associated with Future Care so Expensive?

The management of such impairments may require the utilization of various healthcare and otherprofessionals along with drugs, technological resources, services, and equipment. Theseexpenses can quickly add up. The following list outlines approximate cost that may be associated with such care:

Occupational Therapist	$100/hr
Physiotherapist	$100/hr
Message Therapist	$85/hr
Job Coach	$75/hr
Personal Trainer	$75/hr
Psychotherapist	$175/hr
Rehabilitation Support Worker	$50/hr
Personal Support Worker	$25/hr
Case Manager	$100/hr
Gym Membership	$750
Palm Pilot	$300
Computer & Software	$1,500
Exercise equipment	$2,500
Medications	$5,000 - $10,000/yr
Housekeeping & handyman services	$7,500 - $10,000/yr
Taxis	$10,000 - $20,000/yr

[134]*Marcoccia (Litigation Guardian of) v Gill*,[2007] OJ No1333, 156 ACWS (3d) 831 (Sup Ct).
[135]*MacNeil (Litigation Guardian of) v Bryan*,[2009] OJ No 2344, 81 CPC (6th) 116 (Sup Ct).

In all cases, it is also common that the plaintiff will incur costs for supplies, equipment, and home modification.

II. Guardianship and Management Fees

a) Overview

Guardianship and Management fees consist of three main components:

1. Compensation for the non-corporate guardian;

2. Compensation for the corporate guardian; and

3. Legal fees for guardianship.

In personal injury cases, a lump sum award is given to the plaintiff to provide for the remainder of his/her life. The calculation of such an award assumes that the amount will be invested. As noted above, financial awards can be large (in the millions) and often the appointed non-corporate guardian (such as a parent) lacks the financial expertise to know how to invest such a large sum. Therefore, investment and management of the funds becomes a joint venture between the non-corporate guardian and a corporate guardian, such as a trust company.

In *Arnold* v. *Teno*,[136]the Supreme Court of Canada confirmed that in many cases plaintiffs will require the services of skilled financial advisors to assist them in the management of their capital sum. It is appropriate, therefore, to provide a sum for financial services or a management fee (for both corporate and non-corporate guardians).

The Supreme Court of Canada elaborated on this concept in *Mandzuk v. Insurance Corp of British Columbia*.[137]The Court held that an award of amanagement fee is not automatic; rather, it is based on evidence that financial assistance is in fact necessary in the circumstances.

b) Non-Corporate Guardians

A non-corporate guardian will have the following responsibilities:

- Fiduciary duty to act in the best interests of the Plaintiff;
- Meet with the corporate guardian to review performance of investments and investment strategy;
- Receive and review reports from corporate guardian;
- Seek direction from the court for any changes that fall outside the investment plan; and,
- Liaise with the case manager.

[136]*Arnold v Teno (Next friend of); JB Jackson Ltd v Teno*,[1978] 2 SCR 287, [1978] SCJ No 8.
[137]*Mandzuk v Insurance Corp of British Columbia*, [1988] 2 SCR 650, [1988] SCJ No 100.

The amount of the award for management fees for non-corporate guardians is not a fixed amount. Rather, it will be determined on a case-by-case basis by looking at the following factors:

- The severity of the plaintiff's injuries;
- The size of the award (accordingly the management fee is assessed after the jury renders The verdict or after the trial judge calculates the amount of the award);
- The remaining lifespan of the plaintiff;
- The care and responsibility involved;
- Time required to perform duties;
- Skill and ability shown;
- The plaintiff's abilities to fend for himself/herself; and
- Success resulting from the administration.

c) Corporate Guardians

Corporate guardians will be responsible for creating an investment and management plan. A portion of the damage award is usually invested in a structured annuity and the balance is invested in the capital market. A capital fund allows flexibility to respond to changes in the future (i.e. advances in medicine).

The amount of compensation that they are entitled to for doing so is determined by the *Substitute Decisions Act*(“*SDA*”).[138]The*SDA*has a fee scale which provides for the following:

- 3% on capital income and receipts;
- 3% on capital and income disbursements; and
- 3/5 of 1 % on the annual average value of the assets.

d) Legal Fees

In addition to management fees, a court may award legal fees which are incurred in managing the Plaintiff's finances. Legal fees are often incurred as a result of the following:

- Initial application for guardianship;
- Regular passing of accounts;
- Motions to court for advice and direction;
- Amendments to investment and management plan;
- Appointments of new guardian;
- If the plaintiff is a minor, involvement of a children's lawyer until the plaintiff reaches 18.

e) Recent Examples

[138]*Substitute Decisions Act, 1992*,SO 1992, c 30.

The following are some recent damage awards for guardianship and management fees, from the cases above:

i. Sandhu

- $268,000 for non-corporate guardian (based on 10 hours per week at $15 per hour);
- $1,127,000 for corporate guardian; and
- $400,000 in legal fees.

ii. Morrison

- $447,164 for management fees (4%).

iii. Gordon

- $525,925 for management fees (5%).

iv. MacNeil

- $830,000 for management fees.

III. Risk Premiums

A "risk premium" refers to the concept of awarding plaintiff's counsel additional coststo compensate them for the risk they assumed in taking on the case.

The Supreme Court of Canada recently considered the “risk premium” in *Walker v. Ritchie*.[139] In that case, counsel for the impecunious plaintiffs carried a personal injury suit arising from a motor vehicle accident through its four-year duration without remuneration despite the defendants' denial of liability. The defendants rejected an offer to settle but were found liable at trial.

The plaintiffs' award exceeded the offer, sothe plaintiffs were therefore entitled to their partial indemnity of their costs up to the point of the offer and substantial indemnity costsfrom that point onward.[140] On the basis of the risk of non-payment, the trial judge awarded a premium of $192,600 to plaintiffs' counsel. On appeal, the Court of Appeal for Ontario upheld the risk premium. On further appeal, the issue before the Supreme Court was whether the plaintiffs' costs award should have been increased to take into account the risk of non-payment· to the plaintiffs' counsel.

The Supreme Court allowed the appeal and rejected the risk premium award and held that:

- While it may have been proper for the plaintiffs' lawyer to charge a risk premium to theclients, defendants would have no way to assess such a premium and could not include the risk of incurring such a premium into their decision of whether or not to settle.

[139] *Walker v Ritchie*,2006 SCC 45, [2006] SCJ No 45.
[140] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 49.

- Having defendants pay risk premiums was not considered to be an effective means toencourage counsel to take on the cases of impecunious clients.

- In disallowing the risk premium, the Supreme Court of Canada focused on the wording of theprovisions of Rule 57 that became effective on January 1st, 2002. Rule 57 did not cite the riskof non-payment as a relevant factor in determining costs. The cost scheme *did* enumeratefactors such as complexity, length of trial, result, and conduct of the parties as factors to beconsidered in a cost award. The Court felt that awarding a risk premium would be doublecounting.

- Threat of a risk premium would incline defendants with a meritorious defence to settle.

- It would also encourage plaintiffs to pursue a claim that is not meritorious.

The issue was considered again by the Superior Court a few months later in *Ward v. Manulife Financial.*[141]The Court found that the Supreme Court's decision in *Walker* was no longer applicable. This was because of legislative changes in 2005 to Rule 57 which now permitsthe award of risk premiums.

The relevant part of the new rule reads as follows: "Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act* … (d) to award costs in an amount that represents full indemnity".[142]

The following are some recent examples of awards for risk premiums:

- *Walker* - $200,000
- *Ward* - $50,000
- *Sandhu* - $350,000

Successfully Reducing Claims

There are three notable approaches to reducing claims for future care. Those approaches are as follows:

The Common Sense Approach

There is some evidence that the courts, at least in British Columbia and Alberta, have come to see "common sense" as a necessary check against some expert assessments of future care costs. As the British Columbia Court of Appeal noted in *Penner v. Insurance Corporation of British Columbia*,"a little common sense should inform claims under this head, however much they may

[141]*Ward v Manulife Financial*, 46 CCLI (4th) 139, [2007] OJ No 37 (SupCt).
[142]*Rules*, *supra* note 140, r 57.01(4)(d).

be recommended by experts in the field".[143] This passage has been quoted with approval in several subsequent decisions in the courts of British Columbia[144] and Alberta.[145]

This “common sense” approach requires, for example, that the court finds an "evidentiary link" between each item an expert claims will be required for future care and a physician's assessment of pain, disability and recommended treatment.[146] It is hopeful that this approach will become more common for non-catastrophic cases, where future care costs may be perceived to place the plaintiff in a better position than they otherwise would have been but for an accident.

The Battle of the Experts Approach

Another successful method in reducing claims is for a defendant to appreciate the value of providing responding future care costs reports. This process is known as the “battle of the experts”. It has recently been clarified that in Ontario, the Superior Court judge has inherent jurisdiction to order a party to be examined by a non-health practitioner.[147]

What this means is that defendants may seek a court order to have the plaintiff undergo an assessment for the purpose of assessing future care costs. This allows for an expert called by the defendant to be in a better position to provide an assessment of the plaintiff's care needs as they may be aided by first-hand observation.

Proper Scrutiny

Another means of reducing a future care costs claim is, of course, to scrutinize the medical evidence upon which the assessment is based. In *Degennaro v Oakville Trafalgar Memorial Hospital*,[148]the defendant failed to provide responding reports challenging the assessment of the rehabilitation counselor provided by the plaintiff's expert. On appeal, the care costs were reduced on the basis that the medical reports on which the care costs were based were not reasonable.

Essentially, the failure of the medical reports to credibly establish the plaintiff's loss of abilities and capacity formed a faulty foundation for the reports; negating the credibility of the medical reports asserting the plaintiff’s loss and limitations effectively discredited the corresponding future care reports relying on them.

[143]*Penner v Insurance Corporation of British Columbia*, 2011 BCCA 135, 17 BCLR (5th) 244 at para 13.
[144]See e.g. *Lane v. Pedersen*, 2014 BCSC 1302; *Tran v. Edbrooke*, 2013 BCSC 1802 ; *Smith v Moshrefzadeh*, 2012 BCSC 1458; *Scoates v. Dermott*, 2012 BCSC 485; *Prempeh v. Boisvert*, 2012 BCSC 304; and *Kristiansen v Grewal*, 2014 BCSC 623.
[145]*A.T.-B. vMah*, 2012 ABQB 777, [2012] AJ No 1416.
[146]*Gignac v ICBC*, 2012 BCCA 351.
[147]*Ziebenhaus v Bahlieda*, 2014 ONSC 138.
[148]*Degennaro v Oakville Trafalgar Memorial Hospital*,2011 ONCA 319, [2011] OJ No 1836.