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Future Cost of Care Awards

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PRACTICAL TIPS TO REDUCE THOSE EVER INCREASING FUTURE COST OF CARE AWARDS

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The purpose of this paper is to provide the applicable legal principles applied by the courts in British Columbia and Ontario when assessing future cost of care claims, a synopsis of the two most common approaches to cost of future care awards, and practical tips for reducing these awards.

Introduction

In catastrophic injury cases awards for cost of future care can be in excess of ten million dollars. With increasing frequency, we see large claims advanced under this head of damages. It is a tactic commonly used by plaintiff's counsel to increase the funds available to their clients. It is employed as a mechanism to combat the "upper limit" of \$100,000 that can be awarded to injured plaintiffs for their non-pecuniary or general damages for pain and suffering pursuant to the 1978 trilogy cases (see: *Thornton v. School District No. 57 (Prince George) et al.*, [1978] *Andrens v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Arnold v. Teno*, [1978] 2 S.C.R. 287).

Large future cost of future care awards also have the resultant effect of further increasing the total amount of a claim as they usually result in increased awards for income tax gross-up and management fees.

Lastly, large future cost of care claims are most commonly advanced in cases involving traumatic brain and spinal cord injuries, as these injuries generally involve situations where the injured plaintiff's life has been altered in almost every respect. In practice, it is usually easier to attack the cost of future care claim in a brain injury case than cases involving spinal cord injuries as many of the items are required and subject to less debate between the competing experts.

The Test

British Columbia and Ontario courts apply a similar test with respect to the assessment of cost of future care claims. In British Columbia, when assessing a claim for cost of future care, the case of *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 (SC) sets out the principles a court must consider when assessing an award under this head of damages. *Milina*, supra sets out:

1. The trier of fact must determine what is reasonably necessary on the medical evidence in order to promote the mental and physical health of the injured plaintiff;
2. In performing this assessment, courts must be mindful of the fact that the future is uncertain and allowances must be made for the contingency that the assumptions upon which the award is based may prove to be inaccurate; and
3. The over-riding principle of *restitutio in integrum* must be maintained – namely, the injured person be restored to the position he or she would have been in had the accident not occurred, in so far as this can be done with money.

Also applicable are the comments of the Supreme Court of Canada in *Krangle v. Brisco*, 2002 SCC 9:

“damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person’s best interest. They calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the “normal expectancies’ measure”, a term which “more clearly describes the aim of awards of compensatory damages in tort: namely, to reposition the plaintiff to the destination he would normally have reached . . . had it not been for the tort”. The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best as they can be ascertained. The defendant is required to compensate for those losses. To award less than what may be reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.”

In *Pelletier, v Her Majesty the Queen in Right of the Province of Ontario*, 2013 ONSC 6898, a recent decision of the Ontario Supreme Court, the trial judge reviewed the applicable legal principles to apply in assessing a future cost of care claim. The court summarizes these principles at pages 56-57:

1. The exercise of assessing cost of future care is speculative because we do not have a crystal ball to see what the future holds for each plaintiff;
2. The award must be fair to both parties;
3. The court must remain focused on the injuries of the plaintiff when assessing losses and that fairness to a defendant is achieved through the application of the reasonableness standard and by ensuring that the plaintiff’s claims are legitimate and justifiable; and
4. The reasonableness standard dictates that a consideration of a proposed expense be undertaken with a view to whether a reasonable person of ample means would be willing to incur the expense.

Further, in both jurisdictions, a factor the courts consider in assessing cost of future care claims is whether the proposed item is “medically justified” or “medically necessary”. Much court time has been spent trying to wrestle the distinction between these terms. Generally, courts will consider “whether a reasonable-minded person of ample means would be ready to incur the expense”(*Brennan v. Singh*, 1999 CarswellBC 484).

Lastly, when assessing damages for cost of future care the trier of fact must ensure that the proper methodology is employed in making the calculations so that duplication is avoided. This is a difficult exercise and one which is generally hotly contested by plaintiff and defence counsel.

Competing Approaches – The Total Lifestyle Approach vs. The Incremental or Additional Expense Approach

There are two main approaches to advancing a future cost of care claim. The “Total Lifestyle Approach” is the methodology usually employed by plaintiff’s counsel when advancing a claim under this head of damages. Conversely, defence counsel usually advocate for the “Incremental or Additional Expense Approach”.

The difference between, and applicability of, these approaches is aptly summarized by the court in *Milina*, supra:

1. The Total Lifestyle Approach may be more appropriate where the plaintiff’s entire future life has been radically changed because of his or her injury. This involves situations where a plaintiff requires a totally new environment and totally new care than would have been required had he or she not been injured. This approach suggests that the simplest and fairest approach is to award such a plaintiff all these costs and make a deduction from loss of future earnings for what would have been spent on basic necessities.
2. The Additional Expense Approach may be more appropriate in cases where the plaintiff will continue to lead basically the same life as he or she would have led, had he or she not been injured, with the aid of additional assistance and physical facilities. This approach is more frequently applied when a plaintiff has suffered a less serious injury. In these cases, the easiest way to calculate the loss caused by the accident is by totaling the cost of the extra assistance and facilities that the plaintiff will require. (*MacEachern v. Rennie*, 2010 BCSC 625, *Milina v. Bartsch*, supra)

However, courts maintain the theory that despite the two different approaches, if applied correctly, the end result should be the same.

MacEachern v. Rennie, supra, provides a thoughtful analysis of the dichotomy between the Total Lifestyle and Additional Expense Approach to cost of future care. In this case, the plaintiff suffered a severe brain injury when her head was struck by a tractor-trailer while she was either walking or riding her bicycle along the paved shoulder of a roadway. A complicating factor in assessing damages, in particular with respect to cost of future care, was that at the time of the accident, the plaintiff was addicted to drugs and living in a “tent city”. Plaintiff’s counsel argued at trial that the Total Lifestyle Approach ought to be used to assess damages so that the plaintiff receives compensation for all medically justified expenses. However, the defence argued that this was not appropriate as it was not possible to deduct an amount for the plaintiff’s basic living expenses.

After considering the evidence, the court held that the Total Lifestyle Approach was more appropriate. Ehrke J., held at para [708]:

“I am satisfied that in the unusual circumstances of this case, the approach advocated by the plaintiff is correct. I find as a fact, based on the plaintiff’s past history, that regardless of how long she would have taken to recover from her drug addiction and regardless of what kind of employment she might have secured in the future, one thing that can be predicted with some confidence is that she would have continued to match her lifestyle to her available income. That being the case, *restitutio in integrum* will be achieved by providing a cost of future care award that provides for all of her medically justifiable expenses including those of ordinary living, while giving her no award for loss of future income. This approach takes into account the two unusual features of this case: first, that as a result of her accident, the plaintiff’s future living expenses will, for medically justifiable reasons, be far different from what they otherwise would have been (she cannot receive proper medical care while living in a tent), and second, that she is someone who, but for the accident, was content to adjust her living standards to match her available income.

The plaintiff was awarded damages of \$5,275,000 for her cost of future care. As you can see from the above, the facts of each particular plaintiff’s pre-accident situation will factor in to how the court assesses cost of future care. Moreover, the fact that the plaintiff may have lived a very marginal pre-accident lifestyle will not preclude the court from awarding significant damages for their cost of future care.

Practical Ways to Reduce Claims

The following are a number of potential avenues one can consider in an effort to reduce future cost of care awards sought by plaintiffs. It is important to note that this analysis must be done on a case-by-case basis and each case will turn on its specific factual matrix.

a) Life Expectancy

Frequently, in situations where a plaintiff has suffered a catastrophic injury, his or her life expectancy will be reduced. A plaintiff is only entitled to damages for the cost of future care required during his or her life. Accordingly, the defence will usually argue a diminished life expectancy of the plaintiff. Defence counsel must retain a life expectancy expert to provide an opinion on this point.

A reduced life expectancy is generally seen in spinal injury cases. However, a traumatic brain injury will not necessarily result in a reduced life expectancy. For example, in *McEachern v. Rennie*, supra, the court found that the plaintiff’s life expectancy had actually been increased as a result of her injury as the plaintiff would no longer be engaging in her risky lifestyle.

b) Individual Care vs. Group Care

Again, the amount claimed will depend on the particular facts of each case. However, counsel should carefully review the care plans advocated by plaintiff and defence experts, as group care will not always be less expensive than individual care. Depending on the individual plaintiff’s needs, if placed in group care, he or she may require additional one-on-

one care and therapy which could have been provided by the individual care attendant. thus, in these situations, individual care may be more cost-effective.

c) Licensed Practical Nursing (“LPN”) Care vs. Lower Level Care

Frequently, plaintiffs will seek to recover significant hours of care to be provided by a LPN. Care plans advocated by plaintiff’s experts must be reviewed carefully to see if the care recommended requires an LPN to provide same. In many instances, most of the care can be provided by less expensive care aids and provisions can be made for an LPN to attend only to perform the task the lower level aid is not capable of doing. This can result in significant cost savings.

d) Care totaling more than 24 hours and/or Overlapping and/or Unnecessary Therapies

It is important to carefully tally the amount of care per/day recommended by the plaintiff’s expert. Often, if the hours are tabulated, it will result in care in excess of the hours available during the day to provide it. Also, frequently plaintiff’s expert reports will claim for home support services when the plaintiff will reside in a group home where such services are already provided.

e) Is the Care Covered by Provincial Health Care Benefits

Depending on a plaintiff’s medical condition, some aspects of the recommended care may be covered under provincial health care benefits. For example, a diabetic plaintiff will not need the services of a nutritionist as this medical service is provided on an outpatient basis at most hospitals and is covered by a province’s Medical Services Plan. Whether the provinces’ Ministry of Health may seek to recover such costs is a subject for another day.

f) No Award for Frivolous Items

Courts will carefully review plaintiff’s expert reports that recommend significant future cost of care awards and will disallow non-essential or “frivolous” items. Triers of fact have disallowed recovery for items such as: weekly visits to hair salon for plaintiff who wants long hair, gifts for family, travel costs for care personnel (Disneyland trips not medically justified), own car vs. HandyDART and taxi’s, an ATV, a hot tub, sporting goods, an ipad, Automobile Association Memberships and winter tires (see: *Best v. Thomas*, 2014 BCSC 1033; *MacEachern*, supra)

g) Is there Evidence the Plaintiff Will Not Use Services

The defence can argue that costs for future care should be disallowed when evidence exists that there is no evidence the plaintiff would actually use the services. In *Gignac v. ICBC*, 2012 BCCA 351 the court did not allow the cost of pool program because the plaintiff did not like to swim or going into water. However, this is not a simple argument to establish. Courts have rejected the argument that because an injured plaintiff’s judgment is so impaired that they may not readily accept the care that is medically justified and reasonable, an award should not be made (*Van v. Howlett*, 2014 BCSC 1404)

Further in *O'Connell v. Yung*, 2012 BCCA 57, the defence argued that as there was no evidence the plaintiff or her husband would ever use the major care recommendations made by the plaintiff's rehabilitation expert, such should not be allowed. The court, while conceding this is a relevant consideration, refused to penalize the plaintiff and concluded that plaintiff in the future may be forced to accept care that she would prefer not to have, and further that her needs may increase over time. In making an award in this regard, the court applied a contingency to reflect the plaintiff's current needs and the likelihood those needs would increase over time.

It is noted that the test might be slightly less onerous in Ontario as the courts have held the test to apply is "whether there is a real and substantial risk of future pecuniary loss" (*Kelly v. Perth*, 2014 ONSC 4151).

b) Care to Address Pre-Accident issues and Failure to Screen Out Ordinary Costs

When reviewing plaintiff's experts' recommendations regarding the future care required, defence counsel must be mindful of the plaintiff's pre-accident condition. For example, speech/language therapy was disallowed in a case where the plaintiff had pre-accident speech issues (*Best v. Thomas*, supra). On a similar note, it may be necessary to adduce evidence that some of the items are expenses the plaintiff would have incurred even in the absence of the injury (i.e. gym membership, personal trainer, cell phone/iphone, ipad, housekeeper and/or nanny to mind children).

Further, while it may be attractive to argue as a defence in cases with a plaintiff who had a less than ideal pre-accident life, that any cost of future care award must be significantly discounted to take into consideration the pre-accident problems, this argument is not always accepted by the courts. Rather, it can be difficult to isolate pre-accident v. post-accident issues (*Pelletier*, supra).

i) Care for Which There is No Medical Necessity

Courts may refuse to allow costs of future care when the defence can establish there is no medical necessity for the item sought. Medical evidence will be required to establish an evidentiary link between the doctor's assessment of the treatment required and the care recommended by a future care expert (who is not usually a physician). This may not require the physician to testify with respect to each and every item claimed, as long as an evidentiary link can be established (*Gregory v. ICBC* 2011 BCCA 144 @ para 39).

Conclusion

As one can see from the above, plaintiff's counsel will seize every possible opportunity to increase the amount of an award sought by advancing large cost of future care claims. Particularly, in traumatic brain injury and spinal cord injury claims. Since courts can be reluctant to disallow cost of future care items without proper justification and tend to justify allowing items on the basis that the analysis of the cost of future care is speculative, defence

counsel must be vigilant in scrutinizing these claims to see if any of the above arguments can be employed to reduce the award.

Further, it is imperative that defence counsel obtain the necessary evidence to support these arguments. It is simply not sufficient to advance the arguments outlined above without the proper evidentiary foundation. Defence counsel should retain similar experts as the plaintiff to critique the plaintiff's reports. A defence physiatrist/rehabilitation expert will be able to compare the recommendations of both the plaintiff and defence care experts and indicate preferences and reasons against some of the care costs recommended by the plaintiff's experts and to support the defence experts' recommendations. Economists can be very helpful in dealing with tax issues (i.e. assumptions for calculating income tax gross-up, the deductibility of certain medical expenses and advising on which care items might be covered under Provincial Plans.

In conclusion, if one can adduce the requisite evidence, there is a reasonable prospect of succeeding in reducing future cost of care awards.

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