Knowing Vital Future Care Cases

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There are well established legal principles that guide the assessment and award of future care claims. These principles, described in an evolving body of case law, assist the court in its determination of future care awards. Counsel who advance claims for future care on behalf of their clients and counsel who oppose these claims, should be aware of the cases that have established the basis for future care claims and of the cases that provide instruction about how to assess and prove these claims.

This paper briefly reviews some important case law regarding the basic principles that support claims for future care; how future care claims are assessed; and the requirements to prove future care claims at trial.

Full Compensation for Future Care

The basic principles supportive of future care claims date back to a set of three cases decided by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd*.[1], *Thornton v. School Dist. No. 57 (Prince George) et. al*.[2] and *Arnold v. Teno*[3], the "Trilogy".

In *Andrews*[4], Dickson J. confirmed that "full compensation" is the paramount concern of the courts in cases of severely injured victims. This principle of full compensation is echoed throughout subsequent case law that evaluates future care claims. In *Andrews*, the court held that the care setting most advantageous

[1] Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229
[2] Thornton v. School Dist. No. 57 (Prince George) et. al., 1978 Can LII 12 (SCC), [1978] 2 SCR 267
[3] Arnold v. Teno,1978 Can LII 2 (SCC), [1978] 2 SCR 287
[4] Andrews, supra at page 241

to the Plaintiff was the one that should be awarded and that the Plaintiff cannot be forced to mitigate his/her loss by accepting a lesser standard of care[5].

Professor Cooper-Stephenson emphasizes this principle of compensation in his text, Personal Injury Damages in Canada. According to Professor Cooper-Stephenson:[6]

> 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 McLachlin J. in *Watkins v. Olafson*[7], 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*…
>
> McLachlin J. reasserted the pre-eminence of the compensatory principle in *Ratych v. Bloomer*[8], stating that "the Plaintiff is to be given damages for the full measure of his loss, as best as can be calculated."

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:[9]

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[5] Andrews, supra at page 242
[6] Ken Cooper-Stephenson, Personal Injury Damages in Canada, 2nd Edition (Scarborough: Carswell, 1996) at page 411
[7] Watkins v. Olafson, 1989 Can LII 36 (SCC), [1989] 2 SCR 750
[8] Ratych v. Bloomer, 1990 Can LII 97 (SCC), [1990] 1 SCR 940
[9] Personal Injury Damages in Canada, supra

> 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 further explains:[10]

> 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*:[11]

> The standard of care expected in our society in physical injury cases is an elusive concept. 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 principle of full compensation for future care is also recognized as a response, in part, to the arbitrary limit placed on non-pecuniary damages. In his text, The Law of Damages, Professor Waddams states:[12]

> The tenor of Dickson J.'s judgment in *Andrews v Grand & Toy*, makes it clear that the court will lean in favor of the Plaintiff in judging the reasonableness of his claim. The court

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[10] Personal Injury Damages in Canada, supra
[11] Andrews, supra at page 246
[12] Stephen Waddams, The Law of Damages (Loose-Leaf Edition), (Toronto: Canada Law Book, 1999) at paragraphs 3-63

> made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for ensuring the adequacy of pecuniary compensation.

In keeping with the principle of full compensation for future care, the courts have accepted a lesser standard of proof when awarding future care claims.

In *Schrump et. al. v. Koot et. al*.[13], the Ontario Court of Appeal explained that future care costs are awarded based on a "reasonable chance" that the losses will occur.

In *Graham v. Rourke*[14], the Ontario Court of Appeal held that if the Plaintiff establishes a real and substantial risk of future pecuniary loss, s(he) is entitled to compensation.

In order for a court to conclude that there is a real and substantial risk of a future loss, the Plaintiff need not prove the loss on a balance of probabilities, but must establish that it is more than mere speculation.[15]

Benevolent Care Providers - care provided by family and friends.

The quantum of damages for the future cost of care should not be reduced because of the availability of voluntary assistance to the Plaintiff from relatives or friends.

According to Dickson J. in *Andrews*[16]*,* it is clear that the damages for future cost of care should not be reduced because of the availability of voluntary assistance to the Plaintiff from relatives or friends.

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[13] Schrump et. al. v. Koot el. al. (1977), 18 O.R. (2d) 337 (C.A.)
[14] Graham v. Rourke (1990), 75 O.R. (2d) 622 (C.A.) at 643

> 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*[17], Mr. Justice Harvey squarely addressed a claim for past care services provided by a family member. Harvey J. explained:

> 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.
>
> (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.
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> (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.

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[15] Athey v. Leonati, 1990 CanLII 183 SCC, [1996] 3 S.C.R. 458 (S.C.C.) at paragraph 27
[16] Andrews, supra at page 243

The principle that a severely injured Plaintiff is entitled to compensation for the value of the services s(he) requires, even though the services are rendered to him/her by members of the immediate family, is generally accepted by courts across Canada.

In Yepremian v. Scarborough General Hospital[18], Morton J.A. explained:

> The Plaintiffs entitlement to recover for the reasonable cost of care cannot be denied because the necessary care and assistance has been provided by his immediate family.

In *Feng v. Graham*[19], the British Columbia Court of Appeal explained that it was not necessary that the Plaintiff establish that he is under any legal or moral liability to pay the amount awarded to the provider of the services in a case where the care had been provided by a family member.

In *Crawford v. Penney*[20], the court held that where the Plaintiff's safety is at risk and someone must be available to her at all times, it would be unreasonable to impose obligations of this nature on her family. Even where a family will continue to participate in a Plaintiff's care and provide companionship. The Plaintiff was entitled to receive 24 hour care from non-family care providers. This burden will not be imposed on a Plaintiff's parents; even through they have and will likely continue to provide her with care and comfort.

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[17] Brennan v. Singh,1999 CanLII 6932 (BC SC)
[18] Yepremian v. Scarborough General Hospital, (1980), 28 O.R. (2d) 494 (C.A.)
[19] Feng v. Graham, 1998 CanLII 3044 (BC CA)
[20] Crawford v. Penney, [2003] O.J. No. 89 (S.C.J.) at paragraph 304

In *Gordon et. al. v. Greig et. al.*[21] , Glass J. dealt with the defence argument that a lower quantum of damages for future care be considered because of the likelihood that the Plaintiff will not accept help from professional care providers.

> Because of his limitations, he will require attendant care for the rest of his life. There is some disagreement about the quality of attendant care that should be allowed for Derek. He has some reluctance to accept assistance from caregivers. The defence suggests that a much lower level of damages be considered because of a lack of likelihood that the Plaintiff will accept the help. In effect, such funds might be wasted.
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> I do not agree with the defence position regarding attendant care. Today, Derek receives attendant care assistance. The care is not a luxurious form of care. It is necessary. There is not 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.

Glass J. considered the defence argument that a contingency should be assessed against the future care claim for the risk that the Plaintiff is unlikely to accept the professional care assistance.[22]

> The defence submits that there should be a 20% contingency on the attendant care claim on the basis that Derek Gordon is not likely to accept this type of assistance. I am not convinced that there should

[21] Gordon v. Greig, 2007 CanLII 1333 (ON SC) at paragraphs 34 and 35
[22] Gordon, supra at paragraph 77.

> be such a contingency when I take into account the evidence of many professional witnesses who stated that Mr. Gordon must have such attendant care. He might not like to have someone hovering about to help him, but the bottom line is that he does and always will need help.

The case law supports the approach that voluntary care provided by friends and family members deserves compensation and that voluntary care cannot be expected to continue, even if it is provided by family members. As a result, damages for future care should be quantified on the basis of what it costs to purchase care in the market place.

Home Care vs. Institutional Care

Issues arise when injured Plaintiffs can be cared for either in their home or in an institutional setting (chronic care hospital, nursing home, group home, etc.). Almost inevitably, it is less expensive to provide care in an institutional setting. However, the courts have supported the award of more expensive care at home in most cases.

In *Andrews*, the paramount issue to be decided was whether, in a case of total or near-total disability, the future care of the victim should be in an institutional or a home care environment. According to Dickson J:[23]

> Contrary to the view expressed in the Appellate Division of Alberta, there is no duty to mitigate, in the sense of being forced to accept less than real loss. There is a duty to be reasonable. There cannot be “complete” or “perfect” compensation. An award must be moderate and fair to both parties. Clearly, compensation must not

[23] Andrews, supra at page 242.

> 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 the present, where both Courts have favored 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.

According to Dickson J. at page 248:

> I do not think the area of future care is one in which the argument of the social burden of the expense should be controlling, particularly in a case like the present where the consequences of acceding to it would be to fail in large measure to compensate the victim for his loss.
>
> Minimizing the social burden of expense may be a factor influencing a choice between acceptable alternatives. It should never compel the choice of the unacceptable.

In *Arnold*[24], the Supreme Court again confirmed that the provision of an appropriate standard of care must be the prime purpose in awarding damages in personal injury cases.

In *Thornton*[25], Dickson J. found that home care is to be the standard; however, the duration of such care may be affected by contingencies such as difficulty staffing a self-contained establishment or the need to enter hospital for special treatment. Therefore, a 20 per cent contingency deduction was applied to the cost of homecare.

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[24] Arnold, supra at page 323.
[25] Thornton, supra

In *De Champlain v. Etobicoke General Hospital*[26], a 20 per cent contingency discount was applied to the home care component given the real possibility that the Plaintiff might at some time deteriorate in health and require long-term hospitalization.

In *McErlean v. Sarel*[27], the court considered common sense possibilities that could prevent a Plaintiff from having constant home care for the balance of his life. The cost of care at home was awarded for 20 years and the cost of institutional care thereafter.

In *Crawford (Litigation Guardian of) v. Penney*[28], the Court confirmed that the trilogy decisions of the Supreme Court of Canada indicated a strong pre-disposition for home rather than institutional care for a severely disabled Plaintiff. A 5 per cent contingency deduction was applied to address the possibilities of intermittent hospital care, staffing problems and lack of guardianship after the injured Plaintiff's death.

In *Dryden (Litigation Guardian of) v. Campbell Estate*[29], the Plaintiff was entitled to home care with parents for 10 years, in an in-law suite annexed to the family home, and followed by institutional care thereafter.

In *Kenyeres (Litigation Guardian of) v. Cullimore*[30], the court confirmed that the issue of institutional vs. home care must be resolved by determining what would be best for the Plaintiffs. A 10 per cent deduction to the cost of home care was applied in order to allow for the possibility of future institutionalization.

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[26] De Champlain v. Etobicoke General Hospital (1985), 43 C.C.L.T. 89 (Ont. H.C.J.)
[27] McErlean v. Sarel (1987), 42 C.C.L.T. 78 (O.C.A.), leave to appeal to S.C.C. refused at 88 N.R. 204
[28] Crawford (Litigation Guardian of) v. Penney (2003), 14 C.C.L.T. (3d) 60 (Ont. Gen. Div.)
[29] Dryden (Litigation Guardian of) v. Campbell Estate, [2001] O.J. No. 829 (S.C.J.)
[30] Kenyeres (Litigation Guardian of) v. Cullimore, [1992] O.J. No. 540 (Ont. Gen. Div.)

In *Snyder v. Rodger*[31], the fact that home care may be more expensive than institutional care did not mean that is should not be provided. The overriding consideration was the very personal emotional preference for in-home care. The court noted that the preference was not immutable, and may change as experience and passage of time would dictate. The court awarded damages for home care for a period of time and for institutional care thereafter.

Rate of Compensation for Care

The cost of future care outside of an institution is often debated. The hourly rates of care providers; especially when the care is provided by a non-professional or a non-arms length provider, drives many disputes.

In *Sandhu et. al. v. Wellington Place Apartments et. al*.[32] and in *Marcoccia v. Gill*[33]*,* market rates were allowed as claimed at the full agency rates for the level of service.

In both *Sandhu* and *Marcoccia*, Plaintiffs' counsel (Ms. Nancy Ralph) proffered evidence about the added value that agencies offer to Plaintiffs. Briefly, agencies perform police checks of care providers, check references, screen candidates, create schedules for their workers, ensure that when caregivers are ill or unable to work that an alternate attends in their stead, and handle all administrative tasks associated with remuneration of the care providers (taxes, benefits, deductions, etc.).

Sandhu and *Marcoccia* are cases wherein Plaintiffs' counsel presented very thorough and comprehensive evidence in support of why agency rates should be

[31] Snyder v. Rodger, [1993] O.J. No. 1382 (Ont. Gen. Div.)
[32] Sandhu et. al. v. Wellington Place Apartments et al., (19 June 2006) (ON SC) [unreported] upheld by the Court of Appeal (2008), 291 D.L.R. (4th) 220 (ON C.A.)

awarded. Both cases are vital in their instruction about the evidence to call in support of future care claims.

In *Matthews v. Hamilton Civic Hospital*[34] a decision of Mr. Justice Spiegel, the court held that there was no reason why the damages assessed for past care provided by family members should be significantly less because the family members did not have sufficient financial means to hire professional caregivers. Justice Spiegel assessed past care at $30 per hour (he used $30 rather than the average Agency rate of $42). Justice Spiegel used the rate of $12 per hour for 4 hours per day for the second care provider.

Justice Spiegel rejected the defence argument that the plaintiff's family would not likely have earned anywhere close to an amount that would be awarded calculated on the basis of a professional hourly rate.

Justice Spiegel also rejected the defence argument that hourly rate models for assessing the quantum of care produce a misleading illusion of reliability and should be avoided in favour of global awards for past care. This is despite the decisions of Zuber J. in *Dube (Litigation Guardian of) v. Penlon Ltd.*[35] where the Court chose to compensate past care using a global figure and despite the decision of Spiegel J. himself in *Desbiens v. Mordini*[36] where Mrs. Desbiens was awarded a global sum for the care provided to her husband up to the date of trial.

In both *Dube* and *Desbiens*, there was no precise evidence regarding the amount of time expended and the nature of the services provided over and above what would ordinarily have been performed by the family member.

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[33]Marcoccia v. Gill et. al. (26 February 2007) [unreported] upheld by the Court of Appeal (2009) ON CA 317 (Can LII)
[34] Matthews Estate v. Hamilton Civic Hospitals, 2008 CanLII 52312 (ON SC)
[35] Dube (Litigation Guardian of) v. Penlon Ltd.*[35]* (1994), 21 C.C.L.T. (2d) 268 (Gen. Div.) at paragraphs 191-193
[36] Desbiens v. Mordini [2004] O.J. No 4735 (Sup. Ct.)

According to Spiegel J. in *Matthews*[37]:

> The defence contends 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.
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> To limit the award to the amount of income or potential income lost by a claimant would undervalue high quality and skilful services provided by low income or unemployed family members. This would unfairly discriminate against such persons solely on the basis of their economic status.
>
> Moreover, if the family had in fact hired professional caregivers, they would have been entitled to claim "the actual expenses reasonably incurred" under s.61(2)(a). I see no reason why the damages assessed should be significantly less because the family members did not have sufficient financial means to hire professional caregivers.
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> 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 the 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.

[37] Matthews, supra at paragraphs 189, 192, 193, 194

In *Cartaginese v. Castoro*[38], Boland J. awarded past attendant care to the mother of her brain-injured daughter at the rate of $18.00 per hour (the value today is $24.73 per hour). The daughter attended school, achieved mid-70s grades, dressed and groomed independently, rode horses, had friends, helped around the house with chores – cooking, cleaning, laundry, gardening; however, because of behavioural problems and some loss of memory, concentration and executive function, had difficulty in areas that require planning and making sound judgment calls. She needed a "guardian angel" to watch over her from time to time.

Who can give evidence about Future Care

Evidence about future care needs must be founded upon the opinions of experts who are qualified to give such opinions. If the author of a future care cost report is not qualified by education, training or experience to give opinion evidence about care needs, the author cannot give evidence in court of those needs.

The author of a future care cost report cannot give evidence in court about her consultation with a healthcare provider on the issue of care needs. The healthcare provider with whom she consulted must give his/her opinion in court <u>before</u> the author of the future care cost report is called. The author of a future care cost report may be able to give evidence about the market cost of the care needs – but evidence about the needs themselves must be elicited by the appropriately qualified expert.

In *Song v. Hong*[39], Moore J. ruled on the admissibility of evidence from a life care planner. The life care planner (who had previously been qualified as an expert in Ontario and provided information about future care needs in other cases) had

[38] Cartaginese v. Castoro [1995] O.J. No. 142
[39] Song v. Hong, 2008 CanLII 10056 (ON SC)

prepared a report describing the needs of the Plaintiff. However, much information contained in the report was secured through the life care planner's discussions with treatment providers who lived in Korea (where the Plaintiff also resided). The Korean treatment providers were not scheduled to be called as witnesses at trial.

The Plaintiffs explained that the life care planner possessed the requisite skill, training and experience to give opinion evidence in her field; that there was no exclusionary rule and no reason for the court to exercise judicial discretion to keep the evidence of the witness from the jury; and that if the Plaintiffs were required to call each of the people from whom the life care planner took factual information as witnesses at trial, the trial would become overly cumbersome.

Justice Moore would not permit hearsay evidence from the life care planner.

This case (and a further decision of Moore J. on the same issue in Frazer v. Haukioja[40]) does not change the long standing law about admissibility of expert opinion evidence but does represent a change in how future care evidence must be proffered at trial. While life care planners can provide evidence about the cost of care - unless they are qualified to give opinion about the need for care – the expert who instructed the life care planner about need must be called to give that evidence at trial.

[40] Frazer v. Haukioja, [2008] O.J. No. 3277 (S.C.J.)