

Numbers Don't Lie (Do They?)

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Introduction

When plaintiffs are seriously injured, their future changes in an instant and the effects of those injuries last a lifetime. For many injured clients it is too difficult and overwhelming for them to understand the true cost of care they need, and economic losses they have, and will sustain. As personal injury lawyers, it is our responsibility to assemble the best team of experts to obtain compensation for them and when it comes to the numbers, it is the life care planner and forensic accountants that make the difference between a good result and an excellent result.

Future Cost of Care Reports

Future care costs are typically the most substantial component of a plaintiff's claim for damages in significant personal injury cases. The tactics and strategies that lawyers choose to employ to prove a plaintiff's future care claim can considerably alter the valuation of the claim for future care – either positively or negatively. Therefore, it is critical that the authors of these reports be aware of

¹ Thank you to Rikin Morzaria, our partner at McLeish Orlando, for his contribution to the future care principles, strategies and pitfalls.

the applicable legal principles, as well as the practical strategies that can bolster and pitfalls that can detract from, a plaintiff's future care claim.

Principles

Traditionally, expert witnesses, including future care experts, faced a very low threshold for qualification as expert witnesses and were given wide latitude with respect to their testimony. However, in the past several years, courts have placed increased importance on their "gatekeeper" role. In two decisions specific to future care costs, courts have ruled that life care planners are not qualified to assess a plaintiff's needs or supports. In *Song v. Hong*,² Justice Moore noted that the plaintiff's proposed future care expert was not a medical doctor and likely would only be accepted as an expert in the limited field of determining product costs and life cycles. Similarly, in *Frazer v. Haukioja*,³ the trial judge held that a certified life care planner and rehabilitation counsellor retained by the plaintiff to prepare a future cost of care report was "not qualified to assess Grant's needs for services and supports, the frequency or duration of his needs..." The judge further noted that the life care planner did not consult with the plaintiff's treating doctors or other health care specialists, and that the doctors and specialists themselves did not give evidence in support of the recommendations of the life care planner. Accordingly, a future care expert may only speak to the cost and life cycles of various goods and services, with the recommendation for such goods and services originating from treating or assessing specialists, commenting within

² *Song v. Hong*, [2008] O.J. No. 950 (S.C.J.).

³ *Frazer v. Haukioja*, [2008] O.J. No. 3277 (S.C.J.).

the scope of their expertise. Despite the “gatekeeper” role that courts have recently undertaken in relation to expert testimony, courts have reinforced long standing principles with respect to compensating injured plaintiffs. Life care planners should be familiar with the following principles when preparing these reports.

Level of Compensation

It is well-established that a plaintiff is entitled to receive full compensation for any losses he or she has suffered as a result of a defendant’s negligence. In the context of future care, Canadian courts have wrestled with four levels of care, each with the support of various expert witnesses. The first level is subsistence, or what a plaintiff can simply make do with. Second, is what may be described as community care, and it stems from the notion of the expenditure of limited public funds. The third level is full compensation. Fourth, is the highest level of care possible, which includes all the care, housing, and hardware that a victim could wish for or absorb.⁴ Lawyers often refer to this as the “Cadillac” future cost of care plan. In *Andrews v. Grand & Toy*,⁵ the Supreme Court of Canada unequivocally endorsed the third level, that of “full compensation – that is the plaintiff is to be given damages for the full measure of his loss, as best as can be calculated.” In the context of attendant care, the Court further noted that a plaintiff is entitled to home-based attendant care even if it is vastly more

⁴ See *Dube (Litigation Guardian of) v. Penlon*, [1994] O.J. No. 1720 (Ont. C.J. Gen. Div.) at para 16.

⁵ *Andrews v. Grand & Toy Alberta Limited*, [1978] 2 S.C.R. 229

expensive than comparable institutional care: “It cannot be unreasonable for a person to want to live in a home of his own.”⁶ Thus, the standard to be applied is:

[W]hat 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?

Professional v. Non-Professional Attendant Care Providers

Life care planners who claim the full market cost of attendant care services are often met with the familiar defence refrain that the plaintiff has received gratuitous services from family members and will continue to receive those services, instead of using the proceeds of judgment to hire professional attendant care providers. As far back as 1967, the Supreme Court of Canada provided a complete answer to this argument: it is not the role of the court to “conjecture upon how a plaintiff will spend the damages awarded to him or her.”⁷ In *Andrews v. Grand & Toy*, the Court specifically addressed the possibility that Andrews’ mother might provide attendant care services to her son and concluded that the defendant should not get the benefit of such gratuitous services:

*This should have no bearing in minimizing Andrews' damages. Even if his mother had been able to look after Andrews in her own 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.*⁸

⁶ *Ibid.*, at paras 26-28.

⁷ *Andrews*, *supra*, note 5 at para 41.

⁸ *Ibid.*, at para 41.

Availability of Public and Charitable Programs and Services

Another common defence position with respect to recommended future care goods and services is that a plaintiff can avail herself of available charitable or government-funded programs first. Courts have considered this position on numerous occasions and repeatedly held that, because of the uncertainty of continued government funding, future cost of care awards should not be reduced to account for such programs.

Strategies

Create a Detailed Chart of the Cost of the Future Items

One of the best strategies a life care planner can use to support their future care report is to break the costs down into a chart that reflects each of the services the plaintiff requires over various periods of her life. Below is an example:

ATTENDANT CARE REQUIREMENTS AFTER SURGERIES								
DESCRIPTION	YEAR INITIATED	THROUGH AGE	COST	FREQUENCY	PURPOSE	RECOMMENDED BY	ONE TIME COST	ANNUAL COST
Attendant Care after 1 st Plastic Surgery	2009	Once only	\$24.76 per hour; stat rate: \$37.13 per hour	14 days, 24 hours per day	24 hour care following first surgery as she would not be able to exit the home in case of an emergency, nor will she be able to wear her knee brace and therefore she will not be able to bear weight on her left leg. She will not be able to use the stairs to access her bedroom or bathroom. She may require bed baths. Client would require direct care for personal care, bathing, hygiene issues, assistance with getting out of bed, etc.	Ms. Stoch, O.T. Dr. Berbrayer, Physiatrist	\$8,319.36	
Attendant Care Following 5 Subsequent Plastic Surgeries	Unknown		\$24.76 per hour; stat rate: \$37.13 per hour	18 hours per day for 14 days x 5 surgeries	24 hour care following surgeries as she would not be able to exit the home in case of an emergency. Client would require direct care for personal care, bathing, hygiene issues, assistance with getting out of bed.	Ms. Stoch, O.T. Dr. Berbrayer, Physiatrist	\$31,197.60	
Total Cost:							\$39,516.96	

These types of charts will bolster your credibility in front of a jury, as it shows how thorough you have been in planning all of the services the plaintiff will need over her lifetime. It also makes it difficult for a jury to arbitrarily reduce the future care award when they know where all the dollars are allotted. For example, if a life care planner calculates a lump sum of \$500,000 for medical and rehabilitation benefits to a plaintiff over their lifetime without a breakdown of these benefits, then a jury may see that as excessive; half a million dollars is a lot of money for the average juror without seeing where it is going to be used every day. In addition, defence counsel will have more success in his closing submissions to the jury that this is the “Cadillac” treatment and it should be reduced to the defence cost of care numbers.

When giving life to cost of care numbers it is important that you use the correct rates - market rates not *Statutory Accident Benefits Schedule* rates (the latter of which are currently below minimum wage for attendant care). It is also important that you are not referring to attendant care services in accordance with the form 1; it has no relevance in relation to a tort claim for attendant care/personal support worker services.

Discuss the Rising Costs for Health Care Services

Health care costs have increased exponentially over the last decade. In 1999, the average market rate of a registered nurse was \$21.00/hour; today it can be as high as \$60.00/hour, with a minimum number of hours that will be billed for a nurse to attend a private home. It is well-documented that the rate of inflation for most goods and services relating to health care rise at a rate of between 1% and 1.5% higher than the general rate of inflation.⁹ This includes the rate of inflation for the cost of attendant care services. The discount rate to be applied in civil actions to calculate the present value of future costs and losses is prescribed by Rule 53.09(1) of the *Rules of Civil Procedure*: currently 0.3% for the first 15 years and 2.5% thereafter. However, the prescribed rate may be adjusted if it does not accurately reflect the rising costs of the services. Rule 53.09(1) itself reads as follows:

53.09(1) The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is...

In *Walker v. Ritchie*,¹⁰ the Court of Appeal specifically endorsed the trial judge's decision to reduce the discount rate by 1.5% to reflect the correspondingly higher rate of inflation for professional services:

In this case, evidence called before the trial judge established that the costs of professional services are increasing faster than the rate

⁹ Canadian Institute for Health Information: *National Health Expenditure Trends, 1975-2010*. (Canadian Institute for Health Information: Ottawa, 2010).

¹⁰ *Walker v. Ritchie*, [2005] O.J. No. 1600 (C.A.) at para 91.

of inflation, thus justifying the variation to a 1.5% discount rate. Accordingly, the trial judge did not err in accepting evidence supportive of an adjusted discount rate for professional fees.

Therefore, it is important and appropriate for a life care planner to discuss in the body of their report the historical costs of certain services and the current costs today for those services. Once this information is in the future care report, plaintiff's counsel should obtain a qualified health care economist to provide opinion evidence, both on the rate of inflation in general and on the expected rate of inflation for the future goods and services recommended in the cost of care report. The impact of this evidence coupled with a reduction in the discount rate can be substantial; in a recent case within our office future care costs valued at \$4.5 million, the reduction of the discount rate by 1% caused the value of future care damages to increase by over \$1 million.

Pitfalls

Life care planners should speak with the personal injury lawyer retaining them about the scope and services of their reports, ideally before they begin drafting them. There is no doubt that the life care planner has greater expertise in future care costing than does the lawyer representing the plaintiff; however, it is the lawyer who must present the case at trial and do everything necessary to preserve the credibility of the plaintiff, the future care expert, and the claim itself. Often, the conversation is made easier when it is understood that the decisions being made are tactical trial-focused decisions and not one based on a disagreement about the merits of the recommendation from a life care planning perspective.

One of the common pitfalls we see as plaintiff's lawyers is the life care planner fails to update or provide an addendum to the life care plan after there have been changes in the plaintiff's health, employment, or living status. One way to safeguard from this pitfall is to touch base with the lawyer when a trial is approaching and ask them if they would like you to get an update from the client to see if your report needs any amendments. Keep in mind that any addendum or supplementary reports must be served no later than 30 days before trial, otherwise it could jeopardize the trial date. Another common pitfall we see as plaintiff's lawyers is errors of fact or mistaken assumptions made by the life care planner. Such mistakes, particularly if they form part of the rationale for a recommendation, can severely undermine the credibility of the life care planner. If a life care planner is uncertain about a fact or assumption, then they should speak to the lawyer about it or provide alternative scenarios in the event that the assumption is incorrect by the date of trial.

Excessive costs in a future care report are by far the most common pitfall for life care planners. A defence counsel will cross-examine the plaintiff's future care expert on a list of items that appear to be overreaching in order to undermine the credibility of that expert. Often, this is the case with relatively inexpensive items such as smart phones and household devices, such as a long handle reach for a "Swiffer". As a life care planner, consider carefully whether such recommendations are truly *extraordinary*, or whether the plaintiff likely would have purchased similar items in any event. Consider also whether the report is

asking for the incremental cost of upgraded items or the full cost. For example, the cost of modifications to a vehicle every 10 years for a spinal cord injured plaintiff is an extraordinary collision related cost; however, the cost of a new vehicle plus modifications plus insurance every 10 years is an ordinary and extraordinary cost. Remember, the plaintiff's economic loss report will account for the plaintiff's loss of income that would have paid for the **ordinary** costs that the plaintiff would have incurred, such as the cost of a TTC pass, or cars and insurance, and other regular daily living expenses.

The issue of overreaching may also arise in situations where it seems clear that the plaintiff does not truly have a use for the recommendation. Take the example of a life care planner who recommends a sports-specific accommodation device. This is based on the life care planner's information that the plaintiff participated in the sport before the collision; however, the expert failed to mention that the plaintiff stopped participating in the sporting activity 5 years before the collision due to a lack of interest.

Economic Loss Reports

In a typical personal injury case, there are a number of approaches to developing the theory of economic loss and a number of assumptions are made as part of that theory. In cases where a person is unlikely to return to work or has returned to work but is likely to have to retire earlier than otherwise would have been the

case, a major part of the theory revolves around the person's expected retirement age, but for the accident. While each case turns on its own facts, to some extent both plaintiff counsel and defence counsel will base their theories on a presumed retirement age. Many defence theories are based on an outdated notion that people are embracing the idea of Freedom 55 and retiring earlier than in previous generations. The recent data on this point clearly shows an upward trend in retirement age. There are two very good reasons for this trend; people are living longer and saving less for retirement and people simply cannot afford to retire.

The Statistics Canada Life Tables synthesize the mortality experience of a population and enables comparative measures of expected longevity. The 2009-2011 Life Tables produced by Statistics Canada were released on September 25, 2013. The Life Tables available prior to 2013 were the 2000-2002 Life Tables released on July 31, 2006. In this short time period, the average life expectancy of females at birth in Ontario increased from 82.04 years to 83.92 years and from 77.37 years to 79.77 years for males. This trend is consistent with data going back to 1920 which shows a steady and dramatic decrease in mortality and corresponding increase in life expectancy. The life expectancy for females has increased from 61 years to 84 years from 1920 to 2011 and from 59 years to 80 years for males. Statistics Canada also predicts that by 2036 the average life expectancy could reach 88.4 years for females and 85.4 years for males.

On the retirement readiness front, the ING Direct Canada 2012 annual survey of Canadians reveals that 56% of Canadians were concerned with not having enough

income to sustain a good quality of life during retirement. The results also indicate that 48% of Canadians do not have a financial plan for retirement. A recent Toronto Star article entitled, “Pension woes: Middle class faces greatest risk” reported that only one third of the current Canadian workforce is covered by an employer-sponsored defined benefit plan, with this percentage steadily decreasing over time. Only one third of Canadians are contributing to a registered retirement savings plan and nearly half of those contributors are in the top 10 per cent of income earners, making \$150,000 a year or more. With Canada Pension Plan benefits capped at just over \$12,000.00 per year, the average working Canadian will face the difficult choice between continuing to work into their “golden years” or alternatively, to accept a drastically reduced quality of life post retirement.

Factors other than longevity and lack of savings are also at play in terms of people’s decision to postpone retirement. A Statistics Canada Report released in October 2011, “Delayed Retirement: A new trend?” details the following:

- Work is becoming less physically demanding due to technological advances.
- Younger workers are starting full-time work later in life.
- The aging workforce has changed the capacity to replace older workers. The ratio of new workers to retired workers is decreasing dramatically. In 1976, there were 2.3 younger workers aged 25 to 34 years for each worker 55 years or over.

The ratio in 2010 was 1.3. The labour market is expected to tighten due to the smaller incoming age cohort.

The effect of these various factors is already apparent in the statistics surrounding retirement. Over the past 10 years alone, the average retirement age of workers in the private sector has increased from 61.5 to 63.5 for men and 61 to 63.1 for women. A 2012 Statistics Canada report on retirement ages sets out that in 2009, a 50-year-old worker could expect to continue working for an average of 16 more years (16.3 years for men and 16.1 years for women), which means retiring at the age of 66. In the late 1990s, expected working life at age 50 was an additional 13 years. It is reasonable to assume that this trend will continue and is likely to accelerate in the coming years.

None of us possesses a crystal ball, but a more realistic approach needs to be taken when considering retirement age as part of the theory of economic loss, particularly with younger plaintiffs whose “normal” retirement age would be decades down the road. To suggest that a plaintiff that is currently 25 years of age would likely retire at age 60, but for their injuries, ignores the current trends with regard to overall life expectancy and work life expectancy.