

# Escalating Damages in Canada

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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:

1. Future Care Costs;
2. Guardianship and Management Fees; and
3. Risk Premiums.

### **1. Future Care Costs**

#### a) Overview of Future Cost of Care Claims

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 health-care services (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 Claimant may or may not require them. For example, the Claimant'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.

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

An often cited case on the issue of how future care costs are to be calculated in the Ontario Court of Appeal decision in *Schrump v. Koot*.<sup>83</sup> 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 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. 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, and 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 effective 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.**
- 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.

c) Escalating Costs Associated with Future Care

There have been a number of cases recently in which Claimants have been awarded unprecedented amounts for costs associated with future care. Three such examples are:

- i. *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*<sup>84</sup>
  - 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.
- ii. *Morrison and Gordan v. Greig*<sup>85</sup>
  - 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);
  - Witnesses testified that he must have that level of service;
  - Judge concluded that he would require the care whether or not he wanted it.
- iii. *Marcoccia v. Gill*<sup>86</sup>
  - Jury trial;

<sup>83</sup> (1977) 82 D.L.R. (3d) 553; [1977] OJ No. 2502

<sup>84</sup> [2006] OJ No. 2448; (2006) 149 A.C.W.S. (3d) 572 (Ont. Sup. Ct. J.).

<sup>85</sup> 85 [2007] OJ No. 225; (2007) 154 A.C.W.S. (3d) 865 (Ont. Sup. Ct. J.).

<sup>86</sup> [2007] OJ No. 1333; (2007) 156 A.C.W.S. (3d) 831.

- MV A in which the Plaintiff suffered traumatic brain injury which would require intensive lifelong care;
- Awarded \$14 million for costs of future care.

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

Cases in which Claimants sustain brain injuries are often the cases which give rise to high damage awards for cost of future care. Traumatic brain injuries often result in a number of impairments related to the following:

- Memory
- Concentration, focus, attention
- Decision-making
- Multi-tasking
- Judgment
- Confabulation
- Insight, self-awareness
- Learning
- Motivation
- Task initiation
- Perseverance
- Perseveration
- Stamina
- Impulsivity
- Agression, short-temperedness
- Adapting to new situations
- Managing novel or problem situations

The management of such impairments may require the utilization of various healthcare and other professionals along with drugs, technological resources, services, and equipment. These expenses 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 & hatJdyman services	\$7,500 - \$10,000/yr
Taxis	\$10,000 - \$20,000/yr

It is also likely that the Claimant will incur costs for supplies, equipment, and home modification.

## 2. 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*<sup>5</sup>, the Supreme Court 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. Vieira*.<sup>6</sup> The award of a management fee is not automatic, but 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.

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.

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<sup>5</sup> [1978] 2 S.C.R 287.

<sup>6</sup> (1998), 53 D .L.R (4th) 606.

c) Corporate Guardians

Corporate guardians will be responsible for creating and 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*.<sup>89</sup> That *Act* 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) Some Recent Examples

The following are some recent damage awards for guardianship and management fees:

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%)

### 3. Risk Premiums

A "risk premium" refers to the concept of awarding Plaintiff's counsel a cost premium for their risk in taking on the case.

The Supreme Court of Canada recently considered this issue in *Walker v. Ritchie*.<sup>90</sup> 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 and they were entitled to partial indemnity costs up to that point and substantial indemnity costs <sup>89</sup> 1992, S.D. 1992, c.30.

<sup>90</sup> [2006] S.C.). No. 45; 2006 SCC 45.

from that point onward. On the basis of the risk of non-payment, the trial judge awarded a premium of \$192,600 to plaintiffs' counsel. The Ontario Court of Appeal upheld the risk premium. 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 SCC allowed the appeal and rejected the risk premium award. The Court held that:
- While it may have been proper for the plaintiffs' lawyer to charge a risk premium to the clients, 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.
- Having defendants pay risk premiums was not considered to be an effective means to encourage counsel to take on the cases of impecunious clients.
- In disallowing the risk premium, the Supreme Court of Canada focused on the wording of the provisions of Rule 57 that became effective on January 1st, 2002. rule 57 did not cite the risk of non-payment as a relevant factor in determining costs. The cost scheme *did* enumerate factors such as complexity, length of trial, result, and conduct of the parties as factors to be considered in a cost award. The Court felt that awarding a risk premium would be double counting.
- 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 a few months later in *Ward v. Manulife Financial*<sup>91</sup> The Court found that the SCC's decision in *Walker* was no longer applicable. This was because of legislative changes in 2005 to Rule 57 which now permits the award of risk premiums. The relevant part of the Rule is Rule 57.01(4) which 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".

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

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

91 [2007] O.J. No. 37 (Oot. Sup. Ct. J.)