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FUTURE COST OF CARE IN TRAUMATIC BRAIN INJURY CASES

INTRODUCTION
In the last decade there has been an increasing awareness and acceptance by the medical profession of the devastating nature of the cognitive, emotional, and behavioural changes that can occur following a traumatic brain injury. This has translated into a gradual increase in damage awards to plaintiffs who have suffered significant traumatic brain injuries. The greatest increase has been in damages for nonpecuniary loss and loss of income earning capacity. However, damages awarded for future cost of care in many of these cases does not seem to reflect what the plaintiff reasonably requires to sustain or improve their ability to function. The problem may lie with difficulties in articulating and quantifying the nature of the losses resulting from a brain injury.

How can the Court replace the loss of the subtle yet complex functions performed by the frontal lobes? How do you financially compensate for loss of judgment, for loss of the ability to engage in appropriate social interactions, for the inability to plan and organize one’s activities? How do you compensate for difficulties with motivation and for an inability to initiate, regulate and monitor one’s behaviour? The answer requires that we return to the basic principles that the Courts have formulated to properly assess the cost of future care. The first step is to determine what abilities or functions have been affected or lost by the brain injury. The second step is to quantify the cost of replacing what has been lost.

A. Basic Principles – Back to Basics
These basic principles in assessing future care costs were enunciated by the Supreme Court of Canada Andrews v. Grand & Toy Alberta Ltd., where Dickson, J. stated:2

25 In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitution in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

B. Not an exercise in how to save money
Justice does not require the severely injured plaintiff to just “get by” or “make do” with the cheapest possible care. As succinctly put by Morrison, J. in Williams (Guardian at Litem of) v. Low in the assessment of the future care needs of a severely brain injured plaintiff:3

25 This is not an exercise in how to save money. This is an analysis of how best to compensate the plaintiff for her grievous injuries and her loss of quality of life that occurred through no fault of her own but, rather, because of the negligence of the defendant. This is not a discussion of retribution but, rather, one of compensation. [emphasis added]

If the goal of a claim for future cost of care is “to sustain or improve the mental or physical health of the injured person” then the brain-injured plaintiff should not be required to accept less than full compensation for what has been lost. The analysis of how “best compensate the plaintiff” requires an appreciation of the nature of the deficits caused by the brain injury so that the cost of replacing what has been lost can be properly translated into an award of damages for future cost of care.

FULL COMPENSATION FOR FUTURE CARE
Prior to Andrews there was some confusion in the English authorities as to the appropriate test for the assessment of damages for future cost of care in catastrophic injury cases. The issue was whether the plaintiff should be entitled to “full compensation” or something less based on what the jury considered to be fair and reasonable” in the circumstances. This issue was eventually resolved in England in favour of the principle of “full compensation” for pecuniary losses and “fair and reasonable” compensation for non pecuniary losses. Kirby, J. the trial judge in Andrews, reviewed the English authorities and then established the principles on which the assessment of damages are now assessed in Canada:4

13 The principles applicable where the injuries render the plaintiff helpless, are considered in several decisions of the English Court of Appeal and House of Lords.


Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendants’ negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered.

15 In Warren v. King, [1964] 1 W.L.R. 1, [1963] 3 All E.R. 521, Sellers L.J. said that it is an invariable rule in assessing damages for personal injuries to warn juries to keep to a standard of moderation and fairness in the interest of both parties.

... In H. West & Son Ltd. v. Shepherd, [1964] A.C. 326, [1963] 2 All E.R. 625, Lord Reid said at p. 340:

If there had been no curtailment of his expectation of life the man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it for that and for the mental strain and anxiety which results.

19 And at p. 343 he said: “I would consider separately the objective and the subjective element arising from the respondent’s injuries.”

20 At p. 345 Lord Morris said:

... the damages which are to be awarded for a tort are those which, ‘so far as money can compensate, will give the injured party

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21 In the same case Lord Devlin in his dissenting speech at p. 356 cited the words of Brett J. in Rowley v. London & North Western Ry. Co. (1873), L.R. 8 Exch. 221 at 231:

... the jury must not attempt to give damages to the full amount of perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they considered under all the circumstances a fair compensation.

22 This view has been followed in many personal injury damage assessments.

23 Kemp on Damages, vol. 1, 3rd ed., at p. 4, states: “The person suffering the damage is entitled to full compensation for the financial loss suffered.”

24 The note, supplemental to p. 4, points out the contradiction between this latter statement and that of Brett J. quoted above. It draws attention to the fact that while Lord Devlin in his dissenting speech in West v. Shepherd cited this passage with approval in the context of damages for pain and suffering and loss of amenities, the majority judgment delivered by Blackburn J. in the Rowley case contains nothing to warrant Brett J.’s sweeping statement and that in any event the dictum was obiter. The note goes on to state that in Phillips v. London & South Western Ry. (1879), 5 Q.B.D. 78 (C.A.), the true meaning of Brett L.J.’s dictum and its correctness were discussed at some length.

25 In that case Sir J. Holker, Attorney General, said in argument at pp. 83-84:

The accuracy of the rule laid down by Brett, L.J., in Rowley v. London & North Western Ry. Co. is disputed. It no doubt is the rule that a jury must not attempt to give a man a full compensation for bodily injury, if they were to do so there would be no limit to the amount of damages, for no sum would be an equivalent for the loss of a man’s eyes; but full compensation is to be made for pecuniary loss.

26 The Court of Appeal was considering damages to be awarded for loss of professional income arising from injuries sustained in a railway collision. On appeal from the award of damages in the initial trial a new trial was directed by the Queen’s Bench Division on the grounds that not only were the damages inadequate, but the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account (1879), 4 Q.B.D. 406. This was an appeal by the defendant from that decision directing a new trial. The appeal was dismissed.

27 The proposition of the Attorney General quoted above found acceptance by the Court, James L.J. observing at p. 84:

I think that what Field, J. (the trial Judge), meant to say was — so far as the injury results in actual pecuniary loss, you must give the plaintiff full compensation for that loss, but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed upon the principle of making full compensation.

28 The foregoing leading English decisions establish two principles applicable in the assessment of damages for serious injuries, such as quadriplegia:

(1) The plaintiff is entitled to full compensation for pecuniary loss past and future, subject, with respect to loss of prospective earnings, to allowance for the contingencies of life and to discount for accelerated payment.

(2) With respect to non-pecuniary loss, such as pain and suffering, shortened expectation of life, loss of amenities, which do not lend themselves to mathematical calculation, damages should be fair and reasonable.

The Supreme Court of Canada endorsed these two principles in Andrews which was heard at the same time as two other cases of catastrophic injury, Thornton v. Prince George School District No. 57 and Arnold v. Tenax (the “Trilogy”). In Andrews, Dickson J. confirmed that “full compensation” is the paramount concern of the courts in cases of severely injured victims.

23 The principle that compensation should be full for pecuniary loss is well established: see McGregor on Damages, 13th ed. (1972), pp. 738-39, para. 1097:

The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss that he has suffered. This is today a clear principle of law.

24 To the same effect, see Kemp and Kemp, Quantum of Damages, 3rd ed. (1967), vol. 1, at p. 4: “The person suffering the damage is entitled to full compensation for the financial loss suffered.” This broad principle was propounded by Lord Blackburn at an early date in Livingstone v. Rawyards Coal Co. (1880), 5 App. Cas. 25 at 39 (H.L.), in these words:

I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

25 In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitution in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

26 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.

...
87 ...Money can provide for proper care; this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

In Arnold,54 Spence J. made it clear that "...the prime purpose of the Court is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life".

Professor Cooper-Stephenson emphasizes this view in his text, *Personal Injury Damages in Canada:* 55

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,* 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.*" She restated the pre-eminenve of the compensatory principle in *Ravich v. Bloomer,* stating that "the plaintiff is to be given damages for the full measure of his loss as best as can be calculated..." 56

The principle of full compensation for future care is also recognized as being a response, in part, to the arbitrary limit placed on non-pecuniary damages. In his text, *The Law of Damages,* Professor Waddington states: 57

...the tenor of Dickson J.'s judgment in *Andrews v Grand & Toy* makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of his claim. The court made plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation. [emphasis added]

The analysis by the Supreme Court of Canada requires the application of the principle of *restitutio in integrum,* so far as that is possible, to achieve "full compensation". This means that damages for future care should be awarded for whatever is reasonably required to "sustain or improve the mental or physical health of the [brain] injured person".

THE STANDARD OF FUTURE CARE

The Trilogy speaks of "adequate" compensation, not "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: 58

The establishment of this very high standard of post-accident care means that plaintiff can claim almost any anticipated expense that will facilitate their health, including both their physical and mental welfare. [emphasis added]

The defence will often argue that the standard of care is met by the level of care provided for by government subsidized or Worker Compensation programs. However, in *Andrews,* Dickson J. makes it clear that the standard of care is higher than that which may be applicable under statutory or worker rehabilitation systems. 59

40 ...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 to the plaintiff 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 answer must surely be home care...

Full compensation for future care is also not limited by considerations of the cost to the defendant or the social burden of large awards. In response to the social burden argument, Dickson J. stated in *Andrews:* 60

46 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. [emphasis added]

Full compensation suggests a standard of care that allows the plaintiff, as far as possible, to enjoy a lifestyle like the one he or she would have enjoyed but for the injury. In *Malina v. Bartisch,* McLachlin J. stated: 61

184 The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff. [emphasis added]

The following three cases are examples where the Court has rejected the cheaper "get-by" or "make do" approach to future cost of care and has awarded damages which reflect the principles enunciated by the Supreme Court of Canada in *Andrews.*

A. Bracey (Committee of) v. Jahnke 62

In *Bracey* the plaintiff had been confined to a wheelchair prior to the accident as a result of a previous catastrophic injury. The plaintiff had also been receiving in-home assistance for three hours a day prior to the accident. At trial the plaintiff argued for an increase in the amount of in-home care to five hours a day and for the increased care to be extended to cover the rest of her life. The defendant argued that the plaintiff required only four hours per day for one year and could thereafter get by on the pre-accident provision of 3 hours per day.

The Court held that the plaintiff would be entitled to additional care for the remainder of her life. In doing so, the Court stated: 63

34 ...Essentially the defendant's argument is that in as much as the plaintiff and her in home assistants have proven over the last year that 3 hours per day is sufficient, the plaintiff should not be entitled to anything further. In my view the defendant's argument ignores one of the basic principles to bear in mind in assessing damages: the award for future care is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff. (see *Mills* v. *Barstow* [1985], 49 BCLR (2d) 33 (SC) at 73 where the principles of the trilogy are summarized by McLachlin J. (as she then was)).

35 The fact that the plaintiff has been living with 3 hours per day of in-home assistance does not necessarily mean that 3 hours per day is what is reasonable to promote her mental and physical health. The evidence from the bulk of the expert reports as well as from the testimony is that the plaintiff has more deficit and difficulty with every type of physical task. Further, this diminished physical capacity compounds and increases her frustration, isolation, and anger. It seems reasonable to assume in addition, that such a downward emotional spiral is only to be further aggravated by the fact that the assistant, although capable of performing the required tasks in 3 hours, is rushed in so doing. These present circumstances, in my view, are
destined to complicate and add to the deterioration of the plaintiff's health.

It is important to note that the Court was not prepared to have the level of past care dictate the level of future care. The sole consideration was the level of care that would be most beneficial to promote the physical and mental well being of the plaintiff.

B. Roberts v. Moran

In Roberts the plaintiff had sustained multiple injuries including a very severe brain injury. The defence argued that the plaintiff should "make do" with cheaper living arrangements. Her counsel was able to achieve a future cost of care award of $3.8 million by going back to the basic principle of *restitutio in integrum* to convince the Court to make a substantial award to replace what the plaintiff had lost. O’Brien, J. stated:

There was no real issue as to the applicable basic principles in assessing future care costs. The approach to be taken is as outlined in Andrews v. Grand & Toy Alberta Ltd., supra, at p. 462 where Dickson J. (as he then was), writing for the court stated:

Obviously, a plaintiff who has been gravely and permanently injured can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim. …

Minimizing the social burden of expenses may be a factor influenceing a choice between acceptable alternatives. *It should never compel a choice of the unacceptable.* [emphasis added]

Counsel for the plaintiff was able to overcome the initial skepticism of the Judge, who was no doubt influenced by relatively conservative future cost of care awards in previous cases, by starting with the basic principle of *restitutio in integrum*. He carefully analyzed the abilities lost by the plaintiff as a result of the traumatic brain injury. He then went to the experts and had them provide the cost of replacing these lost abilities. The result was one of the largest future cost of care awards for a traumatically brain injured plaintiff who was still capable of living independently, albeit with appropriate assistance. The major component of the $3.8 million award for future care was the provision for 12 hours a week of support services at a cost of $65.00 an hour for a support worker trained in caring for the unique problems of a brain-injured plaintiff. The Judge made the following observations in assessing the need for these services:

268 This is a very difficult aspect of the claim to assess. The nature of Penny’s brain injury resulted in substantial cognitive and memory deficits. It creates problems in learning, organizing and remembering. All experts agreed Penny will require ongoing and substantial community support for the rest of her life. There is substantial evidence many of these problems will become worse with age. Dr. Tucker, the attending neurologist, testified that by the time Penny reaches middle age she will be “very, very disabled”. This unfortunate prognosis was confirmed by Dr. Runney, Dr. Macartney-Filgate and Dr. Collings.

269 Plaintiff’s counsel used one of the leading texts written by Muriel Lezak during his cross-examinations. That text was recognized as authoritative. The following extract is appropriate to this assessment at pp. 186-187:

Although fewer than 10% of head trauma victims are severely impaired they present a major and growing social problem because their rehabilitation needs are so great and costly, because so few return to fully independent living and because their disabilities create severe financial and emotional burdens … Deficits associated with frontal lobe injury are often the most handicapping as they interfere with the patient’s ability to use knowledge and skills fluently, appropriately or adaptively.

270 CHIRS (Community Head Injury Resource Services) is a non-profit government sponsored agency dedicated to assisting persons with head injuries. Many of the individuals the organization assists are impecunious and receive help without fees. Where insurance is available, fees are now being charged. Penny was one of the first or second paying clients. CHIRS is now run by the Ministry of Health (transferred from Community and Social Services).

271 Evidence (from CHIRS workers and Jane Staeb) shows there have been substantial changes in CHIRS billing practices and the hourly rates charged. The new Ministry is apparently adopting a much more business-like approach in providing services. The hourly rates are being audited by the Ministry.

272 Penny has been receiving substantial help from CHIRS since 1994 when she moved into her present apartment which is across the street from CHIRS offices. CHIRS hourly rates have increased from $22.00 in 1992 to $38.00 in 1995 and $47.00 in 1997. Jane Staeb testified she was advised by the CHIRS director that the fees were to be increased to $65.00 (although this has not yet occurred). She also testified that the “going rate” for comparable services provided by companies operating for profit in the Toronto area are about $90.00.

273 CHIRS workers in the past attempted to see if there was any kind of “work activity” that would be suitable for Penny. In spite of intensive investigation they found none and concluded there is not such activity available for her. 274 CHIRS workers have assisted her in doing things such as attending school (often one on one in the classroom) “training” her to use public transport and learning bus and subway routes. They arrange numerous recreational activities, often attending one on one with her when the activity requires; they take her grocery shopping (there is evidence from one worker that Penny would walk around the store with a list of items but was unable to find them, she would bring home frozen food and not know where to put it). One of the workers noted Penny was unable to keep her apartment clean and arranged for a cleaning lady and the worker tried to train Penny to use the laundry facilities in the apartment building.

275 I conclude from the evidence that Penny should not be institutionalized but does require a great deal of support to live independently.

276 Unfortunately, Shayne is unable or unwilling to provide this help.

277 I admit to a certain skepticism when I first heard of the extent of support Penny requires. After hearing the evidence of a number of CHIRS workers, Elaine Low, Catherine Howard, Gaylen Barber, I am satisfied she does require the amount of help she has been receiving. That conclusion is supported by the evidence of the medical
What evidence is required?

A. Onus of Proof – Simple Probability

The standard of proof to establish a claim for future cost of care is the same as for any future pecuniary loss – "simple probability". All that has to be established is a real and substantial "risk" of pecuniary loss. It is not necessary for the Plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur. In Graham v. Rourke, Mr. Justice Doherty explained:21

A Trial Judge who is called upon to assess future pecuniary loss, is of necessity engaged in a somewhat speculative exercise. ... A Plaintiff who seeks compensation for future pecuniary loss, need not prove on a balance of probabilities, that (his) future capacity will be lost or diminished ... if the Plaintiff establishes a real and substantial risk of future pecuniary loss, (he) is entitled to compensation.

This idea is reinforced in the more recent case of Aithey v. Leonardi,22 where the Supreme Court of Canada made the following comments with regard to how the courts should deal with potential future or hypothetical events:

27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: Maillot v. McMonagle, [1970] AC 166 (HL), Malec v. J.C. Hatton Proprietary Ltd. (1990), 169 CLR 638 (Aust. HC), Juntak v. Ippolito, [1985] 1 SCR 146. For example, if there is a 30 per cent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Schrump v. Root (1977), 18 O.R. (2d) 337 (CA), Graham v. Rourke (1990), 74 DLR (4th) 1 (Ont. CA).

B. "Medical Necessity" Is Not the Test

The comments of McLachlin, J. in Milinoa, been frequently cited as a formulation of the "test" for future care awards:23

211 These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

Some defendants have attempted to argue that this formulation requires that before an award of future costs can be made it must be established that they are "medically necessary". However, as Harvey J. stated in Bevan v. Singh,24 to such language appears in the Milinoa decision. Accordingly, Harvey J. found the defendant's argument that future care awards were only to be made on the basis of a "medical necessity" test was not the correct application of Milinoa. He made an award for cost of future care based on what care was justified on the medical evidence, with consideration given to the preferences of the Plaintiff.25

86 In the circumstances here, it is necessary to address the submission of the defendants that medical necessity, purporting to arise from Miliona (Milina v. Barthes) (1985), 49 BCLR (2d) 33 (BCSC), is the appropriate test. I do not agree.

81 This issue was addressed in Zayf. On appeal, (1996), 26 BCLR (3d) 201 (BCCA), where Donald J.A. stated:

I think the proper test is reasonableness and that the psychological and emotional factors influencing the choice of where to live must be considered: Andrews v. Grant & Toy Alberta Ltd. (1978), 2 SCR 229 at 235 and 244. Medical necessity is too stringent a test.
82 While in a specific sense the court in Zopf was dealing with “the choice of where to live”, it was considering the proper test in relation to care of the plaintiff. There is nothing in the judgment of the Court of Appeal in Zopf to suggest there be a different test or tests applicable to the other components of care.

85 In Milina reference was made to what was described as the defendant’s approach, referring to medical justification of the award for cost of future care. Following analysis of such a position, McLachlin J. at p.84 stated:

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

86 This passage from Milina has been quoted and applied since its delivery in 1985.

87 I comment in passing that no where in Milina did McLachlin J. use the words “medical necessity”. [emphasis added]

C. Opinion of medical doctor is not required

In Jacobsen v. Nike Canada Ltd. the future cost of care assessments had been provided by a rehabilitation expert with a background in nursing. The defence argued that the Milina test requires that a medical doctor provide the evidence on which the assessment of damages for future care is based. Levine J. rejected the defence argument, stating:

181 My reading of the test in Milina v. Baritsch in the context in which it is set out is that the cost of future care that may be awarded as damages must relate to the plaintiff’s medical needs and not simply improve the plaintiff’s enjoyment of life. McLachlin J. accepted the defendant’s position in that case, which she summarized at p. 83 of her reasons as follows:

"To the extent that money can be used to sustain or improve the mental or physical health of the plaintiff, it should be awarded under the head of cost of future care. But in so far as it serves only as solace by providing substitute pleasures, it falls under the head of non-pecuniary loss, not cost of future care, the defendants submit.

The distinction is important, because damages for non-pecuniary loss, unlike damages for cost of future care, are limited by the so-called "$100,000 limit".

182 The test she enunciated does not, in my view, require that the evidence of the specific care that is required by the plaintiff be provided by a medical doctor. In Milina v. Baritsch, McLachlin J. accepted the evidence of a rehabilitation expert as to the type of care that should be provided.

Levine J. accepted that the rehabilitation consultants possessed the experience, skill and training to provide expert evidence concerning the specific care required to sustain or improve the mental or physical health of the plaintiff.

The Jacobsen case has been followed in recent decisions where Smith, J. and Garson, J. both ruled that it was not necessary to have the evidence of the future care requirements confirmed by a medical doctor. In fact it could be argued that it is not really the province of the neurologist, neurosurgeon, or even the physiatrist to provide a detailed assessment of future care needs. While they provide the medical diagnosis and prognosis, these specialists don’t have the time to spend with the patient to carefully assess the specific future care needs.

IS SUBSIDIZED CARE DEDUCTIBLE FROM FUTURE CARE?

In the Jacobsen decision the issue was whether government funded home care would be recoverable. The defendant relied on the Court of Appeal decisions in Wipfli v. Britten and Semenoff v. Kokan to argue that the plaintiff could only recover future care costs to the extent that they were going to be incurred. If the costs were government subsidized then the costs would not be incurred and were not recoverable. The plaintiff argued that both Wipfli and Semenoff were distinguishable on the basis that they established that it was only hospital expenses that were not recoverable. Levine J. was of the view that the principles on which Wipfli and Semenoff were decided were not generally applicable to all government subsidies for health care costs. She stated: 

191 While it is true that Wipfli and Semenoff are distinguishable on their facts, the principle on which the decisions are based - that a plaintiff can recover for future care only what the care will cost him - is applicable to every award for damages. The governing principle of a damage award is that the plaintiff is to be restored to the position he would have been in had the accident not occurred, to the extent that this can be done with money (Milina v. Baritsch at p. 78).

192 In this case, the evidence does not prove that the subsidy to which the plaintiff is now entitled is of the type considered in Wipfli and Semenoff. Therefore, though the principle applied in those cases is applicable here, I find that the result is not.

199 It is entirely conceivable today that the personal care services the plaintiff requires and for which subsidies are available based on income will not be subsidized, or if they are, at a much lesser level, in the future. It is common knowledge in the community, and I take judicial notice of the fact that in 1996, 12 years after Wipfli was decided, the health care system in Canada is under significant financial pressure. Governments at all levels are seeking ways to increase their revenues and reduce their costs. It is certainly conceivable that subsidized health care services such as those now available to the plaintiff will not be available in the future as they have been in the past.

200 I do not consider that the principles on which Wipfli and Semenoff were decided are generally applicable to all government subsidies for health care costs. In the absence of evidence that the subsidy provided for long term care is subject to the same legislative safeguards and universality as was the case with the medical and hospital costs at issue in those cases, I am of the view the plaintiff would not be adequately compensated for the cost of his future care if the award were reduced because a subsidy may be available.

Madam Justice Levine’s comments must now be read in light of the recent Supreme Court of Canada decision in Kranige (Guardian ad litem of) v. Brico. The plaintiffs were the parents of a child born with Down’s Syndrome. The doctor did not advise the parents of the availability of prenatal testing that might have detected the disease. The child was permanently disabled and would require care for the duration of his life. The trial judge found that the child would be required to enter a group home at the age of 19 and the costs would be borne by the provincial government under the BC Benefits (Income Assistance) Act. Eighty thousand dollars was added to the award to reflect the contingency that the provincial government would not provide care when the child turned 19. The Court of Appeal allowed the appeal of the parents but the Supreme Court of Canada restored...
the decision of the trial judge and found that the possibility that this statutory arrangement might change in the future was adequately taken into account by the five percent contingency factor in the trial judge’s award. McLachlin, C.J.C. stated: 46

21 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.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. J Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997), 113 LRQ 257, thus suggests that the tort measure of compensatory damages may be described as the “normal expectations” measure”, a term which “more clearly describes the aim of awards of compensatory damages in tort” namely, to re-assign 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 they can be ascertained. The defendant is required to compensate for those losses. To award less than what may 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 TRUST” CLAIMS FOR VOLUNTARY SERVICES

Brain-injured victims often lose the ability to provide the structure and organization necessary to function successfully. They commonly lack the ability to monitor and regulate their behaviour. The impairment in executive functioning of the brain means that the family members must, in essence, assume the role of the frontal lobes for the injured victim. Family members become experts in providing a rehabilitation program which they tailor for the brain-injured member of their family. They perform multiple roles including that of a psychologist, educational consultant, counsellor, financial advisor, occupational therapist, life skills planner, and case manager. Unfortunately, they provide these services gratuitously or are reimbursed by an “in trust” award, which often undervalues their contribution.

In Brennan Harvey J. reviews the principles to consider in the award of a past and future “in trust” claim: 83

93 In the circumstances of this case there are advanced on behalf of the plaintiff Mrs. Brennan, “in trust” for Mr Brennan, substantial claims related to the services rendered by Mr. Brennan for her care, past and prospective. The claims are in the amounts of $110,272 and $77,438, respectively.

94 The subject of “in trust” claims has been given considerable attention in recent years, including, particularly, where the services in question have been rendered within the perspective of a husband/wife relationship or by a child or relative of the family. Here, the relationship is marital and brings into consideration the usual factors of such a relationship.

95 In my view, it is useful to review briefly the factors which are considered in the assessment of such claims. They are:

(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?
(c) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those 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;
(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. [emphasis added]

Harvey J. clearly upholds the principle of “full compensation” in quantifying the value of the contributions of family members. Appropriate evidence should be proffered so that damages can be awarded which reflect the market value of the services provided and not some nominal amount based on minimum wage.

In Frers, Madam Justice Smith allowed a claim of $100,000 for voluntary services performed by the plaintiff’s wife prior to the trial but refused to allow a claim for future voluntary services unless specifically plead. 84

210 The premise that services need not be of a professional or paraprofessional nature to attract compensation was also addressed in West v. Cotton (1995), 10 BCLR (3d) 73 (CA), where Taylor J.A. stated at 81-2:

The appellant says that these services were not of a “paraprofessional” nature, calling on Mrs. West’s training as a nurse or counsellor, but rather the sort of services which could have been performed by any spouse and contends that such services are not in law compensable, citing the decisions of this court in De Sousa v. Kuntz... and Pickering v. Denkin (1995), 58 BCLR (3d) 178. Those decisions have expressly been overruled by this court in Kneeker v. Janssen (1995), 4 BCLR (3d) 178 ... insofar as they suggest that services rendered by one spouse to another in respect of injury suffered in an accident will not be compensable if they fall within the class of services which one spouse can ordinarily be expected to perform for the other in the event of sickness or incapacity.

It is clear from the authorities that an “in trust” award is appropriate where a spouse performs duties which would otherwise have to be performed by a paid worker, and additionally that domestic services which are not deemed professional or paraprofessional are nonetheless compensable.

211 With respect to Janet Frers’s services before trial, I find that the claim does fall under the claim for special damages and that the evidence supports an award. The evidence did not establish the exact amount of time Ms.
Frasers has spent providing assistance above and beyond that which she spent before the accident. I am confident, however, given the evidence as a whole, that it has been a substantial amount, approaching her estimate of five hours per day. I find that an award of $100,000 is appropriate in those circumstances.

While the claim for “in trust” services forms part of the claim for special damages, it would be prudent to plead both past and future voluntary services to avoid having to deal with the issue at trial.

INCOME TAX GROSS-UP

The full compensation principle is also relevant to considerations of taxation on future cost of care awards. The rationale behind the principle has been recognized as requiring that awards for future cost of care are increased or grossed-up to prevent taxation from undermining the award and making it insufficient to provide the level of care intended.

There must be an evidentiary base on which to calculate the tax gross-up. Expert evidence is required, and a large number of variables affect the final figures produced. Professor Cooper-Stephenson identifies several variables, a selection of which appear below as illustrative examples of the mathematical permutations involved:

- **Payments to Third Parties** - any amounts paid immediately out to third parties should not attract tax gross-up.
- **Age of the Plaintiff** - interest received in infancy is not taxable.
- **Initial Capital Outlay** - immediate expenditures to cover long-term needs will not be subject to gross-up.
- **Size of the Award** - the larger the size of the award, the greater the marginal tax rate.
- **Rate of Withdrawal** - if not assumed to be constant, fluctuations could affect the gross-up rate. Essentially, the longer withdrawal is delayed, the greater the impact of taxation.
- **Outside Income** - any outside income the plaintiff will receive will be considered in assessing the gross-up. Outside income will be treated as the plaintiff’s “first” income and attract a lower tax rate while the interest on the cost of care award will be treated as secondary income at a higher rate and will thus require a gross-up at a higher marginal tax rate.
- **Tax Credits** - the impact of tax credits such as the deduction for medical expenses which exceed 3% of the plaintiff’s annual income must be factored into the gross-up considerations.

CONTINGENCIES

It is necessary for the Court to assess the possibility that the anticipated future care costs will be less or greater than initially contemplated. The approach is different than with loss of future income earnings capacity.

The focus will be on the specific care needs of the plaintiff rather than on general statistical information. While in the majority of cases the negative contingencies will be offset by the positive contingencies, the Ontario Court of Appeal in *Freed v. Peterborough (City)* noted that there seems to be a predilection for the Courts to consider only negative contingencies and wondered why the concept of contingencies has almost always been interpreted as a factor resulting in the reduction of future cost of care.

However, one may appropriately ask why the concept of contingencies has almost always been interpreted as a factor which should diminish a damage award. Surely there are contingent factors which may lead to the enlargement of damages. ...
the defence will argue that the plaintiff can “make do” with government subsidized programs. While clearly this cheaper approach to future care may benefit the defendant, it is not what the law provides for. In the words of Dickson, J. in Andrews: “Justice requires something better.”

In Andrews, the plaintiff wanted to live in his home rather than be institutionalized. The Alberta Court of Appeal looked at the claim from the perspective of the cost to the defendants rather than what the law should entitle the plaintiff to receive as adequate compensation for his injuries. They were concerned that the home care option was too expensive. They suggested that his mother could continue to look after him and that just because the plaintiff wanted to remain in his own home did not mean that the cost was justified. Dickson, J. confirmed that the assessment of future care costs is to be undertaken without regard to the involvement of family members. He had this to say about the observations of Court of Appeal: 16

30 ... 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. ... 32 I agree that a plaintiff cannot “conjure up” “every conceivable expense.” I do not think that a request for home care falls under that rubric.

33 Each of the three observations seems to look at the matter solely from the point of view of the respondents and the expense to them. An award must be fair to both parties, but the ability of the defendant to pay has never been regarded as a relevant consideration in the assessment of damages at common law. The focus should be on the injuries of the innocent party. Fairness to the other party is achieved by ensuring that the claims raised against him are legitimate and justifiable.

... 36 With respect to Andrews’ disinclination to live in an institution, the court commented [p. 425]:

He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reason, and that he wished to live in Switzerland or the Bahamas.

37 Andrews is not asking for a life in Europe or in the Caribbean. He asks that he be permitted to continue to live in Alberta and to see his old friends, but in his own home or apartment, not in an institution.

38 The court then expressed the view that the standard accepted by the trial judge was the equivalent of supplying a private hospital. The term “private hospital” is both pejorative and misleading. It suggests an extravagant standard of care. The standard sought by the appellant is simply practical nursing in the home. The amount Andrews is seeking is, without question, very substantial, but essentially it means providing two orderlies and a housekeeper. The amount is large because the victim is young and because life is long. He has 45 years ahead. That is a long time. [emphasis added]

These comments apply just as forcefully with respect to a plaintiff who has sustained a traumatic brain injury. When the trial is over and the experts and the lawyer move on to their next case, will the award for future cost of care be sufficient to purchase the future care necessary to sustain or improve the mental or physical health of the plaintiff in accordance with the principles enunciated by the Supreme Court of Canada? The brain-injured plaintiff should not have to “get by” or “make do”. The goal of future care is to restore the innocent victim to the position he would have been in had the accident not occurred, insofar as this can be done with money. Why should the brain-injured plaintiff receive less than “full compensation”?

2. 1978 CarswellAlta 214 (SCC) at paragraph 25.
3. 2000 CarswellBC 409 (SC) at paragraph 25.
4. 1974 CarswellAlta 87 (SC) at paragraph 13.
5. 1978 CarswellAlta 214 (SCC).
7. Supra, n. 2 at paragraph 23.
8. Supra, n. 6 at paragraph 74.
11. Supra, n. 9.
12. Supra, n. 2 at paragraph 40.
13. Ibid., at paragraph 46.
15. 1995 CarswellBC 2125 (BCSC).
16. Ibid., at paragraph 34.
18. Ibid., at paragraph 207.
19. Ibid., at paragraph 268.
21. Ibid., at paragraph 53.
22. Ibid., at paragraph 103.
23. (1990), 75 OR (2d) 622 (Ont. CA).
25. Supra, n. 15 at paragraph 211.
27. Ibid., at paragraph 80.
29. Ibid., at paragraph 181.
31. Supra, n. 28.
34. Supra, n. 28 at paragraph 191.
35. 2002 CarswellBC 64 (SCC).
36. Ibid., at paragraph 21.
37. Supra, n. 26 at paragraph 93.
38. Supra, n. 30 at paragraph 210. See also the recent decision in Phoornarath v. Mocrerp 2002 BCSC 886 (SC) where Garson, J. awarded a past in trust claim of $29,410 and a future in trust claim of $135,778 in a mild traumatic brain injury case.
41. Supra, n. 9.
42. Ibid., at 449.
43. 1979 CarswellOnt 672 (CA) at paragraph 188.
44. Supra, n. 20 at paragraph 106.
45. Supra, n. 2 at paragraph 40.
46. Ibid., at paragraph 30.