INTRODUCTION – THE BASICS

The Supreme Court of Canada sets out the basic principles for assessing future care in *Andrews* v. *Grand & Toy Alberta Ltd*.[2] Dickson J. on behalf of the Court stated:

> 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.[3]

If the purpose of damages for future care is "to sustain or improve the mental or physical health of the injured person" then the injured plaintiff should not be required to accept less than full compensation for their loss. Justice does not require the plaintiff to get by or make do with cheaper alternatives. In the words of Dickson J., "Justice requires something better."[4] In *Williams (Guardian ad Litem of)* v. *Low*,[5] Morrison J. forcefully makes the point that the assessment of damages for future care "…is not an exercise in how to save money." It is about how to best compensate the plaintiff for the injuries caused by the negligence of the defendant.[6]

The defence will urge the judge or jury to adopt the cheaper "get by" or "make do" alternatives to future care. This approach is wrong. The Supreme Court of Canada in *Andrews*[7] confirmed that the plaintiff should never accept less than the full measure of the loss. It is not for the Court to speculate on what the plaintiff does with the award for future care. But recent cases have strayed from these basic principles. It is important for counsel to remind the court of the law set out by the Supreme Court of Canada, which requires full compensation for future care.

FUTURE COST OF CARE IN CANADA
"Justice requires something better"

BY MICHAEL J. SLATER QC[1]
SLATER VECCHIO LLP
VANCOUVER BC

FULL COMPENSATION FOR FUTURE CARE

Before *Andrews* there was confusion about the appropriate test for assessing future cost of care. Mr. Andrews was rendered a quadriplegic when his motorcycle collided with a truck. He wanted to live in a home. The defendant argued for the cheaper alternative, an institution. The legal issue was whether an injured plaintiff should be entitled to full compensation (home care) or something less based on what the trier of fact considered to be fair and reasonable in the circumstances. The trial judge in *Andrews*[8] reviewed the English authorities and adopted the principle of full compensation for pecuniary loss and fair and reasonable compensation for non-pecuniary loss. Kirby J. stated:

> (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.[9]

But the Alberta Court of Appeal rejected the principle of full compensation and focused on the cost to the defendant rather than the real loss to Mr. Andrews. They said home care was too expensive. His mother could continue to look after him. They said that just because Andrews wanted to remain in his own home did not mean that the cost was justified:

> 141 …[Andrews] 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.[10]

The Supreme Court of Canada said the Court of Appeal was wrong – Andrews should not have to accept less than his real loss. Dickson J. endorsed the trial judge's decision and confirmed that full compensation is the paramount concern of the courts in a claim for future care:

> 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.[11]

Dickson J. confirmed that the assessment of future care is to be undertaken without regard to the involvement of family members:

> …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 …[12]

Dickson J. refused to look at the claim for future care from the perspective of the defendant. The Court made it very clear that the ability of the defendant to pay is irrelevant. The focus should be on the future needs of the injured party not the size of the future care award. Fairness to the defendant is achieved by ensuring that the future care award is legitimate and justifiable.[13]

The principle of full compensation was also confirmed in two other Supreme Court of Canada cases heard at the same time as *Andrews*; *Thornton* v. *Prince George School District No. 57*[14] and *Arnold* v. *Teno*[15] (the "Trilogy"). In *Arnold,* Spence J. clarified 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."[16]

Professor Cooper-Stephenson in his text, *Personal Injury Damages in Canada,*[17] emphasizes that an award for future care should include the full measure of the loss:

> 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 reasserted the pre-eminence of the compensatory principle in *Ratych* v. *Bloomer*, stating that "the plaintiff is to be given damages for the full measure of his loss as best as can be calculated…"[18]

The principle of full compensation is a response to the arbitrary limit placed on non-pecuniary damages. Professor Waddams in his text *The Law of Damages*, suggests that the limit on non-pecuniary loss means that the court should lean in favour of the plaintiff in assessing the reasonableness of the claim for future care:

> …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 it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation.[19]

The analysis by the Supreme Court of Canada requires the application of the principle of *restitutio in integrum,* (restoration to original condition) in so far as that is possible, to achieve full compensation. Dickson J. acknowledges that it is not possible to achieve perfect compensation, but this does not mean that the injured person must accept less than the real loss. If, within reason, "…money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim." Fairness to the defendant can be achieved by ensuring that the claim for future care is legitimate and justifiable.

WHAT IS THE APPROPRIATE LEVEL OF POST ACCIDENT CARE?

The authorities support awards of compensation that will provide a high level of future care for injured plaintiffs. The Trilogy speaks of adequate compensation, not minimal or marginal compensation. Professor Cooper-Stephenson echoes the comments of Dickson J. in describing the level of future care:

> The establishment of this very high standard of post-accident care means that plaintiffs can claim almost any anticipated expense that will facilitate their health, including both their physical and mental welfare.[20]

The defence will argue that the care needs are met by the more basic level of care provided for by government subsidized or worker compensation programs. However, in *Andrews,* Dickson, J. makes it clear that the level of care is higher than mere provision, which may be applicable under statutory or worker rehabilitation systems:

> 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. [21]

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 adopted by the Alberta Court of Appeal, Dickson J. stated:

> 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.[22]

Full compensation requires a level 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. Defence counsel often ignore the approach to future cost of care adopted by the Supreme Court of Canada in *Andrews*. Their arguments focus on the cost to the defendant rather than the loss to the plaintiff. The next section reviews cases where courts have rejected the cheaper alternative approach to future care in favour of the principle of full compensation.

APPLYING THE PRINCIPLE OF FULL COMPENSATION

A. *Bracey (Committee of)* v. *Jahnke*[23]

In *Bracey* the plaintiff had been confined to a wheelchair prior to the accident as a result of a previous catastrophic injury. She was receiving in-home assistance for three hours a day before the trial. At trial the plaintiff argued that in-home care should be increased to five hours a day for the rest of her life. The de-

fendant 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:

> 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 this 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 *Milina* v. *Bartsch* (1985), 49 BCLR (2d) 33 (SC) at 78 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.[24]

The Court was not prepared to have the level of past care dictate the level of future care. The sole consideration was and should always be the level of care that could sustain or improve the physical and mental health of the plaintiff.

B. *Roberts* v. *Morana*[25]

In *Roberts* the plaintiff sustained a severe brain injury. The defence argued that the plaintiff should "make do" with cheaper living arrangements. Plaintiff's counsel achieved a future cost of care award of $3.8 million by taking the Court back to Dickson J.'s judgment in *Andrews*. Counsel started with the principle of *restitutio in integrum* and focused the attention of the Court on what future care was required to replace what the plaintiff had lost rather than on the defence argument which emphasized the care the plaintiff needed to just "get by."[26]

By analyzing what abilities the plaintiff had lost, counsel overcame the initial skepticism of the Court, which was likely influenced by conservative future care awards in previous cases. Counsel then asked his rehabilitation experts to provide the cost of replacing these lost abilities. 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. This result was one of the largest future care awards for a traumatically brain injured plaintiff who was still capable of living semi-independently.

C. *Morrison (Committee of)* v. *Cormier Vegetation Control Ltd.*[27]

In *Morrison*, the plaintiff sustained a severe brain injury that left her with persistent cognitive, emotional, psychological and behavioral deficits. Boyd J. awarded the rough upper limit for non-pecuniary loss. The Court demonstrated significant insight into the devastating consequences of the plaintiff's brain injury, particularly with regard to the significant neurobehavioural deficits that were not always readily apparent.[28]

The defence argued that despite the severe brain injury, the plaintiff could live semi-independently if she received a few hours of daily intervention to provide her with the structure, nutrition, and medication she required. The defence was really saying that the plaintiff could "get by" with less than full compensation. The Court made the following observations regarding the daily supervision required by the plaintiff:

> 103 Once Charm is living on her own, I do not accept that 2-3 hours of daily supervision will be adequate to meet her needs. I expect there will be times when all is going well and that she is living in the company of a responsible male companion (perhaps Mr. Joe) when that is all which is necessary. With the aid of a cell phone and a pager (both of which Charm has successfully used for most of the last year), I find she will be able to call for help,

> if required. Likewise, she will be relatively easily traced to assess and monitor her overall well-being. However, I predict there will be other times when Charm may be without a companion, perhaps by her own choice or as a result of her behaviour and she will require prompting, guidance, and companionship to maintain her physical and emotional health. At those times, she will require something far greater than 2-3 hours of contact.
>
> 104 Doing the best I can to predict the future, and attempting to be as fair as possible to the defendants in estimating reasonable needs, I have assumed that will require supervisory intervention on an average of 6 hours per day for the rest of her life. In adopting this figure, I do not so much predict the actual spending of 6 hours on site with Charm, as I do a variable expenditure of time, ranging from cell phone contact only to hands-on intensive care, depending on her condition and circumstances.[29]

The Court made an award for future cost of care to sustain or improve the physical and emotional health of the plaintiff. The prompting, guidance, and companionship would help replace the lost executive functions caused by the brain injury. The award was legitimate and justifiable as it related to the nature of the neurobehavioural deficits arising from the brain injury. It was reasonable because it provided a balance between full time care and only a few hours of daily supervision.

WHAT EVIDENCE IS REQUIRED?

A. The Test: Medically Justified and Reasonable

In *Milina* v. *Bartsch*, McLachlin J. was faced with an argument by the plaintiff that the "functional" approach should govern the award of future care damages, i.e. providing solace for lost functions. McLachlin J. considered the comments of the Supreme Court of Canada in the Trilogy and rejected the functional approach which the Trilogy confined to non pecuniary damages. McLachlin J. concluded that there must be a medical justification for future care and that the future care claim must be reasonable:

> **199** 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. On the latter point, Dickson J. stated in Andrews at p. 586:
>
> > An award must be moderate, and fair to both parties… But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.
>
> **200** This then must be the basis upon which damages for costs of future care are assessed.[30]

Defendants try to use McLachlin J.'s comments regarding medical justification and reasonableness to suggest that plaintiffs should somehow receive less than full compensation. But *Milina* did not change the principles enunciated in *Andrews*. McLachlin J. merely reinforced the views expressed by Dickson J. that damages for future care involve the assessment of how money can be used to sustain or improve the mental or physical health of the injured person. McLachlin J. observed that happiness and health are often intertwined but damages for future care should not be awarded where the *sole* purpose is to provide solace.

B. Medically Justified

Medically justified does not mean medically necessary. The Court stated in *Brennan* v. *Singh*,[31] that no such language appears in the *Milina* decision. The defendant's argument that future care awards were only to be made on the basis of a "medical necessity" test was rejected. The Court 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:

> 87 I comment in passing that no where in *Milina* did McLachlin J. use the words "medical necessity."[32]

Part of the reason for the continuation of the medical necessity versus medical justification argument is that the medical profession operates under a system with limited resources which must be carefully triaged. The medical profession makes decisions based on what is medically necessary. But the legal test is *medically justifiable*. The role of the medical expert is to provide evidence of the nature of the injury. The trier of fact, with the assistance of health care professionals, may then decide whether the care item claimed can sustain or improve the mental or physical health of the plaintiff.

C. Reasonable

Once the court has found that there is a medical justification for the claim for cost of future care, the court must then decide that the care claimed is reasonable. Several approaches have been considered. In *Bystedt* v. *Hay,*[33] Smith J. asks what expenses would be incurred by a reasonably minded person with the financial resources to pay:

> 163 Thus, the claim must be supported by evidence that establishes the proposed care is what a reasonable person of ample means would provide in order to meet what the plaintiff "reasonably needs to expend for the purpose of making good the loss."[34]

Aberdeen v. *Township of Langley*[35] involved a significant claim for cost of care for a spinal cord injury complicated by a traumatic brain injury. Groves J. was of the view that the principle of "full" compensation in *Andrews* was not sufficiently precise to permit the court to assess whether a particular expense should be allowed. While full compensation is the goal, the Court adopted a more pragmatic approach to assessment of future care which included the requirement that there be medical justification for the expense and that it be reasonable:

> 120 Thus, I think the solution is to consider "full" compensation espoused in *Andrews* in the context of the more pragmatic and widely-followed test set out in *Milina*, namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable. In this sense, the inquiry is more directed to the fact-based determination of whether each individual item is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again. The difference is in many respects semantic, but the former question maintains the focus on the pecuniary loss aspect of the cost of future care, and helps to prevent the Court from extending the award to fulfill the non-pecuniary goal of providing solace for what has been lost. Even in *Andrews*, Dickson J. recognized that *restitutio in integrum* was not possible (at paragraph 25). If the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. That said, the analysis of what is "medically justified" is not as narrow as what is "medically necessary," and all of the parties agree with this proposition.[36]

Bystedt and *Aberdeen* are examples of trial judges looking for ways to reconcile the principles of *restitutio in integrum* and full compensation with the comments of Dickson J. that "fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable."[37] In *Bystedt,* Smith J. says that the claim must be supported by evidence that establishes the future care is "…what a reasonable person of ample means would provide in order to meet what the plaintiff reasonably needs to expend for the purpose of making good the loss." Groves J. says that the principle of full compensation does not permit the court to use the terms "fair and reasonable" to reduce a medically justified future care award. The plaintiff should not be forced to accept less than his or her real loss with a lower level of care than that indicated by the medical evidence. In deciding how to apply the principle of full compensation Groves J. incorporates McLachlin J.'s formulation that the specific care item must be medically justified and reasonable. Groves J. observes that the difference may be semantic but it serves as a cautionary note to the trier of fact to ensure that the claim for future care does not cross over into the claim for non-pecuniary loss where full compensation is not the test.

Recently, in *Jarmson* v. *Jacobsen*[38] the Court rejected a cost of care report on the basis that it was not reasonable. The Court held that the report relied on facts, opinions, and assumptions not in evidence, that the costing of some items were overstated, and in some cases not related to injuries arising from the accident.[39] This case highlights the importance of counsel's role in insuring that the cost of care items are accurate and supported by the evidence. Close scrutiny of a care report coupled with the support of medical evidence will reduce the chances of it being criticized by the court as a gold-plated Cadillac going far beyond what is reasonable.[40]

These cases do not establish any new principles to the assessment of future care nor do they qualify the principles endorsed in *Andrews*. Dickson J. says that the plaintiff has no duty to mitigate his or her damages in the sense of being forced to accept less than the real loss. The defendant's ability to pay is irrelevant. The focus should be on the injuries of the injured party. The reference to "legitimate and justifiable" means any claim that arises from the injury that can be used to sustain or improve the mental or physical health of the injured person and is reasonable in that it is not extravagant. These are considerations for the trier of fact which, if supported by the evidence at trial, will not be interfered with by the Court of Appeal.[41]

D. The Standard of Proof

It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur. Future care that could sustain or improve the mental or physical health of the injured person should be awarded if it is based on a real possibility rather than mere speculation.

Civil Jury Instructions (CIVJI)[42] sets out the standard of proof for future events:

> When you are asked to determine what might happen in the future but for the (injury/loss) you must use a different method of proof. First you must decide if the event is a real possibility, rather than merely guesswork. If it is a real possibility, you must determine the actual likelihood of it occurring.[43]

CIVJI relies on the Supreme Court of Canada decision in *Athey* v. *Leonati*,[44] where Major J. stated:

> 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: *Mallett* v. *McMonagle*, [1970] AC 166 (HL); *Malec* v. *J. C. Hutton Proprietary Ltd.* (1990), 169 CLR 638 (Aust HC); *Janiak* v. *Ippolito*, [1985] 1 SCR 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent 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. *Koot* (1977), 18 OR (2d) 337 (CA); *Graham* v. *Rourke* (1990), 74 DLR (4th) 1 (Ont CA).[45]

Take the example of a plaintiff suffering from chronic pain caused by injuries sustained in an accident. There is a chance future treatment at a pain clinic could sustain or improve the mental or physical health of the plaintiff. As long as the chance is a real possibility rather than mere speculation, the court must award damages that reflect the likelihood of that chance. If the likelihood is 49 percent and the treatment costs $100,000, then the award is $49,000.

E. Opinion of Medical Doctor not Required

Evidence of future care does not need to be provided by a medical doctor. The trier of fact reviews the evidence of rehabilitation experts and decides (1) whether the suggested future care is medically justified in that it arises from the injury and can sustain or improve the mental or physical health of the injured person, and (2) whether the specific care is reasonable. Experts in occupational therapy, rehabilitation, and life care planning have the opportunity to assess the injured person in their home environment. This provides their evidence with the ecological validity missing in the doctor's office.

In *Jacobsen* v. *Nike Canada Ltd.*[46] the future cost of care assessments were 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 this argument and held that rehabilitation experts possessed the experience, skill and training to provide expert evidence concerning the specific care that could sustain or improve the mental or physical health of the plaintiff.[47]

The *Jacobsen* case was followed in *Frers* v. *De Moulin*[48] where Smith J. found that it was not necessary to have the evidence of the future care requirements confirmed by a medical doctor.[49] While the medical experts including the neurosurgeon, neurologist, and physiatrist provide the medical diagnosis and prognosis, these specialists do not have the time to spend with the patient to assess the specific future care needs. In *Aberdeen* Groves J. was surprised that many of the medical experts had spent no more than an hour assessing the functioning of the plaintiff in their medical offices. They did not travel to the home of the plaintiff to assess his long term care needs nor did they have any specific training in life care planning.

In *O'Connell (Litigation Guardian of)* v. *Yung*[50] Fisher J. held that although evidence of care does not need to be provided by a medical doctor, the weight to be given to an opinion on future care will depend on the extent to which recommendations for things like psychological counseling and physiotherapy are supported by the evidence of experts within the relevant field of expertise.

In *Gregory* v. *Insurance Corporation of British Columbia*[51] the plaintiff relied on the report of an occupational therapist in assessing the future cost of care award. The trial judge rejected the report on the basis that the evidentiary support for the cost of care claims rested on the recommendation of an occupational therapist rather than a physician. On appeal Garson JA overturned the trial judge and held that non medical experts can provide opinion evidence on specific future care, provided there is an evidentiary foundation in the medical evidence.[52] The Court of Appeal allowed the plaintiff's claim for house work and yard maintenance but dismissed the plaintiff's claim for chiropractic care on the basis that there was no evidentiary foundation from the physicians.

The decisions in *O'Connell* and *Gregory* do not change the law set out in *Jacobsen* and *Frers*. It is not necessary to have the evidence of the future care requirements confirmed by a medical doctor. In *O'Connell* Fisher J. says it is a matter of what weight to afford the evidence. In *Gregory* Garson J. merely reinforces the view that the trier of fact needs to be able to draw the necessary evidentiary link between the future care and the medical evidence with regard to the nature of the injury.

In *Lines* v. *Gordon*[53] the plaintiff sustained a mild traumatic brain injury. Lander J. relied on the evidence of an occupational therapist to award $900,000 for the assistance of a one to one worker for three hours a day. The Court reviewed the comments of Dickson J. in *Andrews* and held that the standard of proof to be applied was that the award should be medically justified and reasonable. On appeal the appellants argued that the award was unjustified, unreasonable and inordinately high. They argued that the Court erred in relying on the evidence of an occupational therapist. The Court of Appeal rejected these arguments and upheld the decision of the trial judge.[54]

F. Positive and Negative Contingencies

The court must assess the possibility that the anticipated future care costs may be less or greater than initially contemplated. The focus should be on the specific care needs of the plaintiff rather than on general statistical information as is more common in claims for loss of income earning capacity. While in the majority of cases the negative contingencies will be offset by the positive contingencies, the Ontario Court of Appeal in *Fenn et al.* v. *Peterborough (City)*[55] noted that there seems to be a predilection for courts to consider only negative contingencies. The Court questioned why the concept of contingencies has almost always

been interpreted as a factor resulting in the reduction of future cost of care:

> 173 …where a plaintiff has been totally disabled and Courts are faced with the task of providing sums to ensure proper care for a lifetime, one should not be quick to reduce those sums under a ritualistic theory of contingencies. In this case, it is not difficult to foresee that in countless ways [the plaintiff] will be put to extra expense to accomplish the ordinary tasks and to partake of the small pleasures in life and this contingency should be weighed in the balance.[56]

There are a few cases that have considered the effect of positive contingencies. In *Morrison* Boyd J. increased the future care award by 15 percent based on the likelihood that the plaintiff would require more care than was factored into the award.[57] In *Mitchell* v. *We Care Health Services*[58] Kelleher J. added a positive contingency of 5 percent for the likelihood that the plaintiff's circumstances will become worse and require further care. The Court held that it had "not made the plaintiff's aging the defendants' responsibility. It is not a question of aging but the degeneration of a condition the defendants' negligence brought about."[9]

It is important to lead evidence of positive contingencies to balance the negative contingencies raised by the defence. Significant positive contingencies include not only the likelihood that an injured person will need more care in the future but the likelihood that he or she will live longer than their predicted life expectancy.

G. Cautionary Note: Don't Risk Credibility on Inconsequential Items

Counsel should review the future care reports and eliminate all the items that while medically justified and reasonable, may aggravate the trier of fact. In the recent decision of *Penner* v. *Insurance Corporation of British Columbia*[60] the British Columbia Court of Appeal held that "a little common sense should inform claims under this head, however much they may be recommended by experts in the field."[61] The plaintiff was awarded $120,325 for future care on the basis of a report prepared by an occupational therapist which identified the cost and replacement frequency of a number of items said to be required by the plaintiff to cope with his injuries. In reaching its decision the Court of Appeal referred to the comments expressed by the Court in *Travis* v. *Kwon*[62]:

> 109 Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews* v. *Grand & Toy Ltd.*, [1978] 2 SCR 229, [1978] 1 WWR 577.
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> 110 While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
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> 111 This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.[63]

These comments should serve as a warning to counsel. The dusters or scrubbers detract from more significant future care items and may be viewed as extravagant and therefore unreasonable. In *David Ball on Damages*[64] the author recommends that counsel have the expert explain and justify every item in the life care plan. This includes what it is for, why the plaintiff needs it, how much it costs, why there is no cheaper substitute, and what happens if the plaintiff does not get it. With regard to the latter the focus should be on medical and safety consequences.

THE PLAINTIFF HAS PROPERTY OF THE AWARD

The Supreme Court of Canada has confirmed that an award for future care should not be limited because of uncertainty about how the money will be spent. In *Andrews* the Alberta Court of Appeal expressed the fear that the plaintiff would move to a publicly funded hospital after the trial and keep the award designed to enable him to live in his own home. Dickson J. rejected the Court of Appeal's concern and stated that the injured person is free to do whatever he wants with the money awarded for future care:

> The Court [of Appeal] expressed the fear that Andrews would take the award, then go into an auxiliary hospital and have the public pay. It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes.[65]

The Supreme Court of Canada's decision in *Townsend* v. *Kroppmanns*,[66] reaffirmed the comments of Dickson J. in *Andrews* that it is not for the court to speculate as to what use the plaintiff puts the award for pecuniary loss. In *Townsend* the issue was whether the Court could consider that the plaintiff might use part of the future care award to pay legal fees. The defence argued that the tax gross up should be based on future care net of legal fees. The Supreme Court of Canada referred to the important principle in a fault based system that a plaintiff has property of the award. The Court rejected any reduction in tax gross up and stated that it is improper for the Court to consider what a plaintiff does with damages awarded for pecuniary loss including future care. A plaintiff is free to do whatever he wants with the money including paying legal fees or buying a house. Deschamps J. stated:

> 19 …In assessing damages, courts do not take into consideration what victims actually do with the award.
>
> 21 This final and most important principle is that the plaintiff has property of the award. The plaintiff is free to do whatever he or she wants with the sum of money awarded… It is improper for a trial judge to consider what the plaintiff does with awarded damages. As Dickson J., as he then was, wrote in *Andrews, supra*, at pp. 246-47:
>
> > It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes.
>
> 23 In the case at bar, the victim chose to pay her legal fees and buy a house. There is no principled reason why these expenses should be deducted from the award for costs of future care rather than assuming that other sources can bear the cost. This is particularly important in the case of damages awarded for costs of future care. This head of damages is aimed at ensuring an adequate level of care to a person injured as a result of tortious conduct. To reduce those damages would defeat the very purpose of ensuring decent care and full compensation to a victim. Even if it was demonstrated that legal fees were paid with the future costs award because no other funds were available, such a deduction would be irrelevant and inadmissible. The goal of compensation is to provide the plaintiff with the means to be placed in the position she would have been in had the defendant not committed a tort against her. The plaintiff's future actions do not alter the court's duty to meet this objective.[67]

The role of the trial judge is to determine the future care that can, within reason, sustain or improve the mental or physical health of the injured person. The Supreme Court of Canada makes it clear that what the plaintiff does with the money for future care is irrelevant and inadmissible.[68]

Recent decisions have strayed from the principles set out in *Andrews* and *Townsend*. The fears expressed by the Alberta Court of Appeal in *Andrews* have resurfaced in decisions which consider evidence of whether the plaintiff is likely to use the money for future care.

In *Izony* v. *Weidlich*[69] Matsuhara J. refused to award any future care where the plaintiff was unlikely to use the equipment or service. The Court came to this conclusion even though it found that the future care items could likely improve the mental or physical well being of the plaintiff. Matsuhara J. relied on the Court of Appeal decision in *Courdin* v. *Meyers.*[70] But in that case, the Court of Appeal did not confirm any new principle regarding the assessment of future care. The Court found that there was no evidentiary basis to support the award of future care made by the jury. Matsuhara J. also elevates "medically justified" from the comments of McLachlin J. in *Milina* to "medically required":

> 74 I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at [paragraph] 35), or for items or services that it is unlikely he will use in the future.[71]

In *Coulter* v. *Ball*[72] the Court of Appeal disallowed an award for the future costs of supervised living where there was evidence that the plaintiff would not voluntarily live in a supervised setting. Neither *Izony* nor *Coulter* referred to *Andrews* or *Townsend* for the principle endorsed by the Supreme Court of Canada that it is not for the court to consider what the plaintiff does with the money awarded for future care.

The danger in straying from the basic principles in *Andrews* is demonstrated in *Gilbert* v. *Bottle*[73] where the Court relying on the *Izony* decision stated:

> 251 To be awarded, future care costs must be justified both because they are medically necessary and they

> are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony* v. *Weidlich*, 2006 BCSC 1315.[74]

By following *Izony* the Court first elevates the test for future care awards from "medically justified" to "medically necessary."The Court then goes on to consider whether the plaintiff will incur the future care expenses. In *Milburn* v. *Ernst,*[75] the Court applies the language used in *Gilbert* and adopts the medical necessity and likelihood of use approaches. The Court stated:

> [155] Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future if a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award.[76]

These decisions elevate medical justification to medical necessity. They also consider the likelihood that the injured person will incur the future care. By following *Izony,* these cases depart from the fundamental principle that the plaintiff is free to do with the award as he or she likes.

In the recent decision of *O'Connell* v. *Yung* the Court considers whether it is likely the plaintiff will use the full award for future care. Fisher J. was presented with a plaintiff who did not want to accept supervision from anyone other than her spouse. The Court distinguished *Izony* and *Coulter* to situations where there is clear evidence that the plaintiff would not use the recommended services:

> 118 In both *Coulter* and *Izony* there was clear evidence that the plaintiff had not and would not in the future, submit to the services or items recommended. In particular, the plaintiff in *Coulter* had entered a supervised living facility only under the terms of a probation order and he was adamant that he would not continue to do so of his own volition.[77]

Fisher J. found that it was not likely that Ms. O'Connell would refuse private home care services in the future and awarded her those costs. The Court made the award because it was medically justified and was likely to be incurred by the plaintiff.

The Court of Appeal in *O'Connell*[78] agreed that private home care was medically justified. But the Court, relying on *Krangle*, speculated as to whether or not the plaintiff would use 16 hours of the care per day. The Court reduced the trial judge's award for future cost of care by 20% and held:

> [70] …As the authorities make clear, the award must reflect what may reasonably be expected to be required. The evidence established that, at present, the O'Connells do not want outside care and, by inference, will not incur the expense. Nevertheless, the realities of life are such that Mr. O'Connell, who is now 66, may not always be capable of caring for his wife at the level she medically requires. In anticipation of that likelihood, a substantial award for future personal care is required. Although no additional personal care costs were incurred at the trial date, it is not difficult to foresee circumstances in which 16 or more hours per day of care may be required. The difficulty, as always, is in the assessment of that likelihood.
>
> [71] The appellants ask us to reduce the award for future personal care to reflect the current need for six to eight hours of personal care per day. In my opinion, that submission does not adequately protect Ms. O'Connell in the future because, as I have said, there may well come a time when, by reason of her infirmities and Mr. O'Connell's inability to care for her, she will require 16 or perhaps more hours a day of personal care.
>
> [72] In my view, the approach that provides fairness to the parties is to accept the judge's assessment of a need for 16 hours of personal care but to apply a contingency that reflects the current needs and the substantial likelihood that Ms. O'Connell's needs will gradually increase over time. Although the assessment is a difficult one, I would apply a 20% contingency and reduce the personal care services to $1,403,041 (present value).[79]

The approach of the Court of Appeal in *O'Connell* mirrors the cheaper alternative adopted by the Alberta Court of Appeal in *Andrews* when they said that Andrews' mother could continue to look after him. Dickson J. firmly rejected the cheaper approach stating 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."The award should be the same whether the care is provided by a family member or an outside service provider. The Supreme Court of Canada says that the inquiry ends at what is legitimate and justifiable. The plaintiff is free to do whatever he or she wants with the award.

CONCLUSION – BACK TO BASICS

The Supreme Court of Canada says that the assessment of damages for future care is about how to best compensate the plaintiff for the injuries caused by the defendant. An injured person is entitled to full not partial compensation. This requires a level of care that enables the injured person to return, as far as possible, to a lifestyle he or she would have enjoyed but for the injury.

The defence will try to minimize future care by arguing that the plaintiff should "get by" with less than "full" compensation. They will attempt to pass off the responsibility of the defendants to provide appropriate future care by suggesting that the plaintiff can rely on gratuitous support from family members. In the absence of family support the defence will argue that the plaintiff can "make do" with government subsidized health care. If these arguments fail, the defence will say that the plaintiff should not be given any future care that they are not likely to

incur. The Court of Appeal in *Andrews* accepted all of the defence arguments. But the Supreme Court of Canada unequivocally rejected the reasoning of the Court of Appeal. While the cheaper approach to future care may benefit the defendants, it is not what the law provides for.

The Supreme Court of Canada says that to the extent that money can, within reason, be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim for future care. Fairness to the defendant is achieved by ensuring that the claims are legitimate and justifiable. The inquiry ends there. As the Supreme Court of Canada said in *Townsend*, "It is improper for a trial judge to consider what the plaintiff does with awarded damages." A plaintiff is free to do whatever he or she wants with the money.

A well informed judge and a well instructed jury will not accede to arguments that the plaintiff deserves less than full compensation. To do so would fail to compensate injured plaintiffs for their real loss. As Dickson J. put it, "Justice requires something better."

1 The author would like to thank John-Andrew Pankiw-Petty and Saro Turner for their assistance with this paper.
2 *Andrews* v. *Grand & Toy Alberta Ltd.,* [1978] 2 SCR 229, 1978 CanLII 1 (CanLII).
3 *Andrews, ibid.* at page 241.
4 *Andrews, ibid.* at page 246.
5 *Williams (Guardian ad litem of)* v. *Low*, 2000 BCSC 345 (QL).
6 *Williams, ibid.* at para 25.
7 *Andrews, supra* note 2.
8 *Andrews* v. *Grand & Toy Alberta Ltd. et al.*, [1974] AJ No. 279 (SC) (QL).
9 *Andrews, ibid.* at para 26.
10 *Andrews* v. *Grand & Toy Alberta Ltd. et al.*, [1975] AJ 524 (CA) at para. 141 (QL).
11 *Andrews, supra* note 2 at pages 241-242.
12 *Andrews, supra* note 2 at page 243.
13 *Andrews, supra* note 2 at page 243.
14 *Thornton* v. *Prince George School District No. 57,*[1978] 2 SCR 267 (QL).
15 *Arnold* v. *Teno,* [1978] 2 SCR 287, 1978 CanLII 2 (CanLII).
16 *Arnold, ibid.* at page 320.
17 Cooper-Stephenson, K. *Personal Injury Damages in Canada 2 Ed.*. (Toronto: Thompson Canada Limited, 1996).
18 Cooper-Stephenson, *ibid* at page 411.
19 Waddams, S.M. *The Law of Damages, Loose-leaf edition*. (Toronto: Canada Law Book, 1999) at para 3-63.
20 Cooper-Stephenson, *supra* note 17 at page 411.
21 *Andrews, supra* note 2 at page 246.
22 *Andrews, supra* note 2 at page 248.
23 *Bracey* v. *Jahnke*, [1995] BCJ No. 1850 (SC) (QL).
24 *Bracey, ibid.* at paras 34-35.
25 *C.R.(Litigation guardian of)* v. *Morana*, [1997] OJ No. 3089 (CJ), aff'd [2000] OJ No. 2688 (CA) (QL) [*Roberts*].
26 *Roberts, ibid.* at paras 207-208.
27 *Morrison (Committee of)* v. *Cormier Vegetation Control Ltd*, [1998] BCJ No 3279 (SC) (QL).
28 *Morrison, ibid.* at para 53.
29 *Morrison, ibid.* at paras 103-104.
30 *Milina* v. *Bartsch*, [1985] BCJ No 2762 (SC) (QL) at paras 199-200.
31 *Brennan* v. *Singh*, [1999] BCJ No 520 (SC) (QL).
32 *Brennan, ibid.* at para 87.
33 *Bystedt (Guardian ad litem of)* v. *Hay*, 2001 BCSC 1735 (QL).
34 *Bystedt*, *ibid.* at para 163.
35 *Aberdeen* v. *Township of Langley,* 2007 BCSC 993 (QL) [*Aberdeen*] rev'd in part 2008 BCCA 420 on issue of contributory negligence.
36 *Aberdeen, ibid.* at para 120.
37 *Andrews, supra* note 2 at pages 243-245.
38 *Jarmson* v. *Jacobsen*, 2012 BCSC 64 (CanLii).
39 *Jarmson, ibid.* at paras 117-119.
40 *Jarmson, ibid.* at para 119.
41 See *Aberdeen* v. *Zanatta,* 2008 BCCA 420 and *Spehar (Guardian ad litem of)* v. *Beazley*, [2004] BCJ No 1044 (CA).
42 Justice Wilson, D., Justice C. Grauer, L and Justice L. Fenlon, *Civil Jury Instructions*, 2d ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2011) [CIVJI].
43 CIVJI, *ibid*. at para 12.2.5.
44 *Athey* v. *Leonati*, [1996] SCJ No. 102 (QL).
45 *Athey, ibid.* at para 27.
46 *Jacobsen* v. *Nike Canada Ltd*., [1996] BCJ No 363 (SC) (QL).
47 *Jacobsen, ibid.* at paras 181-182.
48 *Frers* v. *De Moulin,* 2002 BCSC 408 (QL).
49 *Frers, ibid*. at para 188 and see *Phoutharath* v. *Moscrop*, 2002 BCSC 686.
50 *O'Connell (Litigation Guardian of)* v. *Yung*, 2010 BCSC 1764 (QL) at para 98 *infra* note 78.
51 *Gregory* v. *Insurance Corporation of British Columbia*, 2011 BCCA 144 (QL).
52 *Gregory, ibid.* at paras 38-39.
53 *Lines* v. *Gordon,* [2006] BCJ No 3318 (SC) varied 2009 BCCA 106 (Court of Appeal Decision cited to QL) [*Lines*].
54 *Lines, ibid.* at para 71.
55 *Fenn et al.* v. *City of Peterborough et al.; Peterborough Utilities Commission et al., Third Parties*, [1979] OJ No. 4312 (QL) at para 172-173.
56 *Fenn, ibid.* at para 173.
57 *Morrison, supra* note 27 at paras 106-110.
58 *Mitchell* v. *We Care Health Services Inc*., 2004 BCSC 902 (QL).
59 *Mitchell, ibid* at para 111.
60 *Penner* v. *Insurance Corporation of British Columbia*, 2011 BCCA 135 (QL).
61 *Penner, ibid* at para 13.
62 *Travis* v. *Kwon*, 2009 BCSC 63 (QL).
63 *Travis, ibid.* at paras 109-111.
64 Ball, D. *David Ball On Damages 3rd Ed.*(Louisville: National Institute for Trial Advocacy, 2011) at pages 189-191.
65 *Andrews, supra* note 2 at page 246.
66 *Townsend* v. *Kroppmanns,* [2003] SCJ No. 73 (QL).
67 *Townsend, ibid.* at paras 19, 21-23.
68 *Townsend*, *ibid.* at para 21 and 23.
69 *Izony* v. *Weidlich,* 2006 BCSC 1315 (QL).
70 *Courdin* v. *Meyers,* 2005 BCCA 91 (QL).
71 *Izony, supra* note 69 at para 74.
72 *Coulter* v. *Ball,* 2005 BCCA 199 (QL).
73 *Gilbert* v. *Bottle*, 2011 BCSC 1389 (CanLii).
74 *Gilbert, ibid.* at para 251.
75 *Milburn* v. *Ernst*, 2012 BCSC 93 (CanLii).
76 *Milburn, ibid.* at para 155.
77 *O'Connell, supra* note 50 at paras 118-120.
78 *O'Connell* v. *Yung,* 2012 BCCA 57 (CanLii)
79 O'Connell, *ibid.* at paras 70-72.