

## Plaintiff Counsel Perspective on Litigating Catastrophic Claims: Thinking Outside the Box

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In all litigation arising from personal injury, the intent is to restore the plaintiff, as much as possible, to his or her pre-accident situation. Since permanent injury and disability cannot be reversed, monetary damages are designed to compensate the plaintiff for what he or she has lost.

The basic heads of damages are quite familiar. Ken Cooper-Stephenson divides them into the following categories in his leading text *Personal Injury Damages in Canada*, 2<sup>nd</sup> ed. (Scarborough: Carswell, 1996):

### “PECUNIARY LOSS:

#### *Special Damages*

##### *Head 1: Special Damages*

- (a) Pre-Trial Loss of Working Capacity
- (b) Pre-Trial Cost of Care

#### *General Damages*

##### *Head 2: Future Loss of Working Capacity*

- (a) Loss of Earnings and Profits
- (b) Loss of Homemaking Capacity
- (c) Loss of Shared Family Income

##### *Head 3: Future Cost of Care*

### NON-PECUNIARY LOSS:

#### *Head 4: Non-Pecuniary Loss*

- (a) Pain and Suffering
- (b) Loss of Amenities
- (c) Loss of Expectation of Life
- (d) Aggravated Damages” (at p. 102)

Non-pecuniary loss provides compensation for pain and suffering, loss of amenities and enjoyment of life, and loss of expectation of life, as well as any aggravated damages related to the manner in which the wrong was committed. It is designed to provide solace, in monetary

form, for what has been lost and cannot be replaced. The amount of non-pecuniary damages is subject to a ceiling or “cap” that has been placed on awards for the most serious injuries. The current value of cap imposed by the 1978 trilogy of cases is \$350,600.

Catastrophic injury qualifying for the upper limit of damages are those cases where the injuries are permanent and have a devastating impact on every aspect of the plaintiff’s life. Groves J. explained in *Aberdeen v. Langley (Township)*, [2007] B.C.J. No. 1515, 2007 BCSC 993:

“Aberdeen sustained catastrophic injuries in the Accident. The effects of those injuries are permanent and impact every aspect of his life. The B.C. Court of Appeal has made it clear that in cases of "severe personal injuries" there is no basis for making fine distinctions between different types of severe injuries. **Any case with devastating injuries qualifies for the upper limit of non-pecuniary damages, notwithstanding that there may be even more severe cases receiving the same damages.**” [Emphasis added.] (at para. 184)

In recent years, plaintiffs in Canada have achieved increased pecuniary and non-pecuniary awards under some of these headings, particularly in catastrophic injury cases, by seeking compensation for novel damages, including compensation in trust for family members who contribute voluntarily to their care and damages for loss of an interdependent relationship. Claims have also been increased by seeking a fuller list of future care costs. This paper will explore some of these novel damages.

### **“In Trust” Claims for the Care of Family Members**

Special damages compensate for pre-trial pecuniary losses, including pre-trial loss of working capacity as well as pre-trial expenses. The two sub-heads of damages correspond to the heads of pecuniary loss under general damages, but in the case of special damages the exact costs are usually well-documented.

Increasingly, special damages awards include ‘in trust claims’. These claims recognize the care family members have provided to the plaintiff above and beyond what might normally be expected in a familial relationship. Harvey J.’s oft-quoted passage from *Brennan v. Singh*,

[1999] B.C.J. No. 520 (S.C.) sets out the basic factors to be considered in assessing in trust claims:

“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.] (at para. 95)

In *Grewal v. Brar*, [2004] B.C.J. No. 1918, 2004 BCSC 1157 the 25-year-old plaintiff suffered a spinal cord injury and traumatic brain injury as a result of a motor vehicle accident. Cole J. considered how to value the care provided by the plaintiff’s mother and mother-in-law:

“...I am satisfied that the plaintiff’s mother, her mother-in-law, and her husband provided services that were necessary for her care; and **that the type of care provided by those persons is over and above the normal duties flowing from natural affection in any family relationship.** ... Having reviewed the case law and the evidence, I am satisfied that an in-trust award for past care is appropriate in this case.

Turning to quantum, although there is no direct evidence regarding the actual hours of assistance provided, **I agree that eight hours per day would be a reasonable figure**, considering all of the evidence. The cost of such assistance has not been dealt with directly, but in my view the suggested guideline of \$25 per hour (based on Molly Maid rates) is rather excessive. I would think that **the rate of \$10 per hour be more in keeping with reality.** According to plaintiff’s counsel, that amounts to \$161,840 for the 2023 days from the date of the accident to the date of trial. Considering the assistance the plaintiff would

have received in any event with the birth of her children, and considering that not all of the care provided was strictly necessary because the plaintiff can do many tasks that her family provided because she was slow in performing many tasks, **I therefore assess an in-trust award for past care at \$110,000.**" [Emphasis added.] (at para. 172-173)

The judge then went on to consider whether an in-trust award for future care was required:

"In respect to an in-trust award for future care, I make no such award as I am satisfied that the award for future cost of care, as I will discuss below, is adequate to cover the plaintiff's future care, and in my view, **family members will not need to provide compensable future care beyond the normal duties flowing from natural family relations.**" [Emphasis added.] (at para. 174)

In *Spehar (Guardian ad litem of) v. Beazley*, [2002] B.C.J. No. 1718, 2002 BCSC 1104, affirmed [2004] B.C.J. No. 1044, 2004 BCCA 290, Koenigsberg J. considered an in trust claim for the plaintiff's mother and sister. The plaintiff suffered a severe traumatic brain injury in a motor vehicle accident. She did not have the skills to live independently. Her mother and sister radically altered their lives for the seven years before trial to attend to the plaintiff's needs. The mother had quit her job to care for her daughter full-time, while the sister postponed her education and career plans to help care for her sister. The judge accepted that the foregone income approach to calculating the in trust claim was appropriate for the mother:

"The replacement of services approach would result in a much greater valuation of the services performed by Ms. Spehar than the forgone income approach. If we assume a base salary of \$30,000 in 1993 and do not allow for any increase in income for the following seven years, **the income forgone by Ann Spehar** (after allowing for employment insurance benefits and other income earned) **was \$142,500 ...**" [Emphasis added.] (at para. 50)

With respect to the sister's in trust claim, Koenigsberg J. accepted the plaintiff's proposal:

"With respect to Anna Maria Spehar's in-trust claim, the plaintiff's submission is that it is more difficult to make such an assessment. The plaintiff submits that \$50,000 is an appropriate assessment on the basis that one can come to such a number if one simply assumes that there was one hour a day spent in the

last approximately seven and a half years at \$18 an hour. That comes to just under \$50,000. In my view, this assessment must acknowledge that in addition to time spent assisting her sister just to be able to function in the community, which has been, for over five years, **an almost daily task undertaken by Anna Maria, Anna Maria deferred her own education and work opportunities for at least one year in 1998, in order to rescue her sister from peril and accompany her to Croatia.** This trip, of over five months out of the country, was an intensely stressful one for both sisters and demanded a nearly all-day every day commitment from Anna Maria to remain focussed on her sister's deep depressive state to bring her out of it.

**Anna Maria has devoted herself far and above a normal sisterly duty to assist her mother in assisting Natalia to function,** primarily by providing what her frontal lobes no longer can provide. ... **Only in the last two and a half years has Anna Maria begun to live her own life independently of the need to be available to her sister on an almost daily basis. While \$50,000 initially appeared to me to be high, I take the view that Anna Maria has sacrificed in fact more than she even knew.** ...

If she had been able to pursue her job and school prospects between 1997 and 2000 unfettered by her sister's needs, she would likely be at least two years further along in her career. This matter is not quantifiable. But it is a factor to consider. ... **\$50,000 in my view is thus not an excessive assessment for past services.**" [Emphasis added.] (at para. 52-54)

An in trust award was also granted in *Aberdeen v. Langley (Township)*, [2007] B.C.J. No. 1515, 2007 BCSC 993 in the sum of \$1000/month for the plaintiff's daughter and \$500/month each for the plaintiff's son and his ex-wife for the care they provided over the 48 month period prior to trial for a total in trust award of \$96,000.

In *Wilson (Guardian ad litem of) v. Russell*, [1999] B.C.J. No. 2004 (S.C.), affirmed [2000] B.C.J. No. 2346, 2000 BCCA 611 the plaintiff's parents estimated that they had spent about 13,000 hours caring for their son, who was 16 at the time of the accident. Rowan J. held that the services provided by the parents were necessary and of substantial value and took much time away from their employment. He awarded a total of \$50,000: \$30,000 for the plaintiff's mother and \$20,000 for the plaintiff's father.

In *Suveges v. Martens*, [2000] B.C.J. No. 1037, 2000 BCSC 810 the in trust claim for the daughter's care of the mother was calculated based on a rate of \$100/day, minus a \$40/day set

off for the free accommodation provided for the daughter. There was no future care in trust claim as the damage award for cost of future care covered all the mother's future care needs.

And in *Izony v. Weidlich*, [2006] B.C.J. No. 1986, 2006 BCSC 1315 Masuhara J. considered the ways in which the wife assisted the husband and awarded \$25,000 in trust for her efforts:

“The plaintiff claims \$100,000 for past and future care and assistance provided by Sherry Izony. The defence argues that Mrs. Izony's past wage loss results from her leaving part-time employment at Pennington's. She lost 26 months of work. ... the total wage loss amounted to \$12,272. ...

**Mrs. Izony provided much-needed nursing care for Mr. Izony upon his return from the hospital. With training, she gave Mr. Izony his medication intravenously through a pump, cleaned his tracheotomy opening, cleaned his urine catheter, measured and recorded his urine output, and cleaned areas where skin grafts were taken and applied. While this care would otherwise have required a paid home care attendant, I find that Mrs. Izony's activities since she returned to work reflect what would normally be expected from a spouse in an established working marriage. I find, however, that Mrs. Izony is able to provide more skilled care than an average spouse because of the training she received after the accident, and that she may have to reduce her full-time hours somewhat to provide such care in the future. ... Accordingly, I award \$25,000 for Mrs. Izony's in-trust claim.”** [Emphasis added.] (at para. 82-83)

These cases show that the quantum awarded for an in trust claim in each case depends on the facts. The basic principles behind these trust claims, however, are now well established.

### **Loss of Interdependent Relationship**

The total award under Future Loss of Working Capacity encompasses all post-trial pecuniary benefits which the plaintiff would have generated from work, but which she or he will not now be able to generate as a result of ongoing disability. Traditionally, loss of working capacity is calculated by estimating the weekly, monthly or annual value of work that the plaintiff would have performed and then deducting from this the value of work the plaintiff is now capable of doing. In most catastrophic injury cases the plaintiff is no longer competitively employable. The court must then assess the plaintiff's pre-accident working life expectancy. The final amount is

adjusted for positive and negative contingencies, inflation and interest generated from the lump sum, etc.

Loss of homemaking capacity involves any loss or impairment of the ability to perform both manual and management tasks in the context of the home environment, from routine housekeeping to larger annual clean-ups and the scheduling of long-term maintenance and repairs. Compensatory damages for this loss range across every lifestyle and family situation. As with the in trust claims for the provision of voluntary care services by family members, the loss of homemaking capacity is often calculated on a replacement cost basis.

Loss of shared family income is a more recent development under the head of damages for Future Loss of Working Capacity. More commonly called loss of interdependent relationship or loss of marriageability, it involves the loss of the benefits of joint income and shared expenses in a permanent interdependency relationship. The claim was recognized in a number of decisions culminating in the ground-breaking judgment of Lambert J.A. in *Reekie v. Messervey*, [1989] B.C.J. No. 797, 59 D.L.R. (4<sup>th</sup>) 481 (B.C.C.A.). At trial, Locke J. awarded the plaintiff \$50,000 for the loss of opportunity to marry. Lambert J.A. explained the significance of this head of damage and suggested a more appropriate heading:

“This aspect of the damage award was called "Loss of Opportunity to Marry" by counsel and by the trial judge. **But marriage itself is not the significant point. The significance lies in the loss of an opportunity to form a permanent interdependency relationship which may be expected to produce financial benefits in the form of shared family income.** Such an interdependency might have been formed with a close friend of either sex or with a person with whom a plaintiff might have lived as husband and wife, but without any marriage having taken place. **Permanent financial interdependency, not marriage, is the gist of the claim.** For the sake of simplicity and consistency, I will now usually call this head of loss: "Lost Opportunity of Family Income". [Emphasis added.]

The judge then explained that there is a pecuniary and a non-pecuniary aspect to this head of damage and they must not be confused:

“The second point to note is that there is **both a pecuniary and a non-pecuniary aspect to loss of opportunity to form a permanent interdependency relationship**. The proper course is to consider the non-pecuniary aspect in the award for non-pecuniary damages, and the pecuniary aspect in the award for other pecuniary losses. **Care must be taken to distinguish the two and care must be taken to avoid double compensation**. Loss of the rich emotional benefits of a loving relationship must be compensated for under the heading of "non-pecuniary loss" or not at all. **"Lost opportunity of family income" deals only with the financial aspects of the loss of an opportunity to form such a relationship.**” [Emphasis added.]

The Ontario Court of Appeal recently commented on the loss of interdependent relationship in *Walker v. Ritchie*, [2005] O.J. No. 1600 (C.A.):

“Over time, the authorities cited by the trial judge, and other authorities, have come to accept **loss of interdependent relationship as one component of a compensatory damages award. Such an award compensates a plaintiff for a future financial loss**. Before the accident, the sociable and socially-active Stephanie would very likely have formed an interdependent relationship with another person. After the accident, it became highly unlikely that Stephanie would form or could sustain such a relationship.

**Stephanie therefore lost the opportunity to share a household with a partner. Accordingly, she lost the opportunity to share household expenses**. In the result, Stephanie will pay one hundred percent of her household expenses, instead of the lesser share of expenses had a partner assisted her with those expenses. **Her loss, accordingly, is measured by the loss of the contribution that she would have received but for the accident.**” [Emphasis added.] (at para. 53-54)

The appeal court affirmed Brockenshire J.’s award of \$125,000 under this head of damage:

“This is a heading of **future pecuniary loss, based on the proven and well known fact that two people can live together less expensively than they can live apart**. This is a relatively new head of damages, but at the same time has been discussed frequently enough to acquire the acronym L.O.I.R. [Loss of interdependent relationship]. ...

... From this background, while nothing is certain, the strong probability would have been that she would have married, and that the marriage would have endured. Now, she has not only physical, memory and cognitive difficulties, but also personality problems which have left her with few if any friends, and

led her own sisters to say that she can be difficult to be with or talk to. **It is obvious that her chances of marriage, or of any interdependent relationship, have been significantly reduced, and if such a relationship is entered into, the chances of it breaking up have been significantly increased.**

Mr. Wollach, in his calculations, uses average ages for the date of marriage, assumes a shared income until age 63, assumes a marriage to someone of similar socio-economic background, here a University degree (which I had earlier accepted) and builds in, through the future wage projections, all of the contingencies for sickness, death, withdrawal from the workplace, etc. ...

...

I accept the premises and contingencies allowed for by Mr. Wollach, and while recognizing that it would be possible for Stephanie to be both a single mother and have an interdependent relationship during her lifetime, to avoid a double recovery being made, I apply a further contingency to Mr. Wollach's figures re child care. **I therefore assess the damages for future loss of interdependent relationships at \$125,000.**" [Emphasis added.] (at para. 188-195)

In *Bartosek v. Turret Realties Inc.*, [2004] O.J. No. 1088 (C.A.), affirming [2001] O.J. No. 4725 (S.C.J.), the appellate court affirmed the trial judge's conclusion that a claim for loss of interdependent relationship was too speculative in the case of a 6 year old plaintiff. And in *Hartwick v. Simser*, [2004] O.J. No. 4315 (S.C.J.) the judge concluded that the facts did not support the contention that the plaintiff would not form an interdependent relationship in the future.

In *Grewal v. Brar*, [2004] B.C.J. No. 1918, 2004 BCSC 1157 (S.C.) Cole J. recognized that there could also be an entitlement to damages under this heading for the breakdown of an existing relationship:

"However, in my view, there does not seem to be any reason in principle that a claim should be limited in the manner suggested by the defendants. In *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Thomson, 1996) at 338, regarding this head of damage, Cooper-Stephenson writes:

The claim has so far been considered only in cases where the plaintiff's injuries were such that she or he would likely not now *enter* a permanent interdependency relationship; **but it also applies to situations where**

**injuries cause the *breakdown* of such a relationship.** It may now be the rare case where a court will hold a marital breakdown as a result of injuries to be a *novus actus interveniens*, and **it is therefore necessary to consider the implications of lost interdependency in this situation.** The claim can be conceptualized as one for “loss of support” of a nature familiar in fatal accident cases. **If post-injury breakdown of an existing interdependence relationship is a result of the injuries, either as an event that has occurred prior to the trial or as a possibility in the future (*i.e.* if the injuries merely increase the probability of breakdown), the claim for loss of shared family income may become relevant.” [Italics in original, bold emphasis added.] (at para. 159)**

The evidence in *Grewal* indicated that the plaintiff’s relationship with her husband had been based on their love for sports and athletic activities. Post-accident the relationship had become very strained. The plaintiff could no longer participate in sporting activities, her personality had changed, she had decreased sexual interest, etc. Both the plaintiff and her husband expressed concerns about whether the marriage would last. Cole J. considered the various contingencies, including the likelihood the marriage may have failed in any event, and assessed \$30,000 under this head of damage:

“I am satisfied that the marriage up to the date of the accident was a reasonably good marriage, but today, the average length of marriages that we see in our courts is approximately 10 to 12 years. ... **there is a reasonably good possibility that the marriage may have failed in any event in the future and the impact of the accident may only hasten the onset of a separation or divorce.**

If the marriage does fail, the plaintiff in my view would move back in with her parents, with whom she has a close relationship and with whom she has been living with part-time more or less since the time of the accident. Therefore, **her costs would not increase as much as they might for a person who would live alone after marriage breakdown; she would not suffer such a significant loss of the benefit for shared expenses or of shared homemaking.**

As to the loss of the benefit of a higher combined income, I expect (but do not find) that **if the marriage fails, Dhar Grewal will be obligated to pay spousal support, as well as child support which will indirectly benefit the plaintiff.**

Because of her injuries, especially her cognitive deficits and emotional problems, it seems to me unlikely that the plaintiff would remarry in the future if her present marriage fails.

Taking all those factors into account, **I am satisfied that a modest award is appropriate, and I award the plaintiff \$30,000 under this head.**" [Emphasis added.] (at para. 162-166)

Thus, a claim for damages for the loss of interdependent relationship need not be limited to cases in which the plaintiff has yet to marry or form an interdependent relationship. The head of damages applies equally to the risk of breakdown of an existing interdependent relationship and the losses stemming therefrom.

### **Detailed Future Cost of Care Lists**

General damages for the Future Cost of Care seeks to provide compensation for all post-trial expenses which the plaintiff will incur, which he or she would not have incurred but for the injury. The primary focus here is on medical and hospitalization expenses, and on expenses which will be incurred in adjusting to an appropriate post-accident living environment. The cases below suggest that the more comprehensive the list of future care needs, the higher the award for cost of future care.

In *Aberdeen v. Langley (Township)*, [2007] B.C.J. No. 1515, 2007 BCSC 993 the plaintiff suffered a C6-7 spinal cord injury resulting in almost no sensation from his chest down and virtually no use of his body from the chest down. He was able to achieve some independence, however, through limited use of his arms. He suffered from relentless chronic neurogenic or neuropathic pain.

Groves J. undertook a thorough review of the jurisprudence regarding the nature of compensation for the cost of future care. The judge noted that the basic principle is that the plaintiff receive full compensation for the pecuniary losses associated with the accident, taking into account negative contingencies, thus making full compensation fair and reasonable for all parties. The judge concluded that the calculation of the cost of future care involves a fact-based

inquiry of whether each individual item is medically justified, noting that the determination of what is medically justifiable is not as narrow a threshold as what is medically necessary.

The cost of future care awarded in *Aberdeen* included 18 hours/day of personal support worker, funding for adaptive aids, as well as home replacement costs. Groves J. accepted that the plaintiff's current home did not suit his needs. The judge held that a new home designed to meet the plaintiff's needs would cost \$830,000 for design, construction, and lot purchase. After deducting the resale value of the plaintiff's current home, the judge awarded \$388,000 for a replacement home.

In *Walker v. Ritchie*, [2003] O.J. No. 18 (S.C.J.), affirmed [2005] O.J. No. 1600 (C.A.) the plaintiff suffered numerous injuries in a motor vehicle accident the most significant of which was a severe traumatic brain injury. Plaintiff's counsel presented an expert report detailing all of the plaintiff's future care needs, each one with a specific rationale for its inclusion. The following were accepted as cost of future care items (see para. 154-179):

- 2 further neuro-psychological assessments during plaintiff's lifetime, justified as helping "in providing specific information at the time of Stephanie attempting to enter the work world, and much later for assessing her needs as a senior"
- 25 hours of neuro-psychological consultations over plaintiff's lifetime
- 10 to 15 occupational therapy assessments over Stephanie's lifetime, in particular to assist with major life transitions such as moving from college residence to her own apartment, starting work, etc.
- Annual occupational therapy interventions and annual physiotherapy assessments
- 4-6 sessions/year with a psychologist for counselling at an annual cost of \$900 (this is intended to be an average over plaintiff's lifetime rather than evenly spaced out year by year)
- Rehabilitation assistant for 6-8 hours/week for the first 3 years, then 4 hours/month thereafter
- Long list of assistive devices ranging from replacement tips for the plaintiff's cane to a manual wheelchair for later in her life
- 2 driver's assessments and 8-10 lessons/assessment
- Transportation or taxi costs for getting to and from appointments, for some social activities, etc.
- Laptop (as a partial substitute for limited ability to communicate in writing) and palm pilot (to assist with residual memory deficits)
- Exercise bike

- 30 sessions of family counselling (to assist family with plaintiff's support)
- 2 long term care plans/analysis at a total cost of \$7,600 – to help the plaintiff with decisions re: where to live, etc.
- Vocational rehab counselling providing guidance for job search skills, job acquisition and maintenance at a cost of \$14,000; two psycho-vocational assessments to help guide career/volunteer direction at a total cost of \$4,000; job coaching and work trials at a cost of \$32,000; and specialized work-site assessment at \$825
- Live-in nanny for 7 years to cover reasonable possibility that plaintiff will have children
- Case manager 2 hours/month at an annual cost of \$2,500
- Homemaker 3 hrs/day, 3days/week until age 30, then increased to 3 hours/day, 7 days/week thereafter
- Cleaning once every 2 weeks until age 30, then weekly after age 30
- Heavy housecleaning twice/year until age 30, then 3 times/year until age 50, then 5 times/year thereafter
- Lawn care and snow removal

In coming to these conclusions on the cost of future care, the trial judge carefully assessed the competing expert evidence on each point. This case clearly highlights the importance of detailed expert evidence as to the plaintiff's potential needs, right down to replacement rubber tips for her canes.

In *Izony v. Weidlich*, [2006] B.C.J. No. 1986, 2006 BCSC 1315 the judge also set out a detailed list of the allowed costs of future care at para. 81:

Summary of award for future care costs:

#### **Initial or One-Time Costs**

<b>Description</b>	<b>Allowed</b>
Van with Lift	10,000
Desensitization Therapy	1,160
Driver Refresher Education	350
Travel Prince George/Vancouver	1,820
Stationary Bicycle	750
Exercise Mat	96
Computer/Internet Access Lessons	450
<b>Add Weight Loss Clinic</b>	750
<b>Total Initial or One-Time Costs</b>	<b>15,376</b>

### Annual Costs

<b>Description</b>	<b>Allowed</b>
Van Replacement	2,000
Physiotherapy	1,080
Massage	720
Case Manager	1,200
Homemaker	13,000
Heavy Cleaning	700
Home Maintenance	1,200
Vehicle Maintenance	500
Lifeline	456
Fitness Membership	360
Kinesiologist (personal trainer)	720
Manual Wheelchair Maintenance	150
Manual Wheelchair Replacement	583
Manual Wheelchair Cushion Replacement	90
Backpack	50
Wheelchair Gloves	76
Bathmat	7
Memory Aids	100
Stationary Bike Replacement	75
Exercise Mat Replacement	19
<b>Add</b> Hand-held Shower Replacement	20
<b>Add</b> Extended Bath Seat Replacement	50
<b>Add</b> Second Bath Mat Replacement	7
<b>Add</b> Scooter Maintenance	95
<b>Add</b> Scooter Replacement	1,000
<b>Sub-total</b>	<b>24,258</b>
<i>Multiplier (Ex. 8 Tab 2)</i>	<i>13.219</i>
<b>Total Annual Costs</b>	<b>320,667</b>
Contingency: motorized wheelchair	21,000
Contingency: deterioration	150,000
<b>Total Future Care Costs</b>	<b>491,667</b>

In *Grewal v. Brar* the cost of future care included some fairly traditional items which were clearly medically necessary and justifiable on the facts of the case: one on one rehabilitation worker for 15 hours/week; 10 sessions of physiotherapy/year; and, the cost of a few hours/month of rehabilitation case management. Also included, however, as in *Walker*, were the cost of numerous smaller items: the annual replacement cost of special kitchen utensils and adaptive aids in the bathroom, four pedicures and manicures each year, etc. The plaintiff was also

awarded an amount for live-in childcare assistance until her youngest child was 6 years old and then 3 hours/day of childcare while her youngest child was age 6-12. As in *Walker*, the cost of future care analysis in *Grewal* shows the benefits arising to the plaintiff from an extremely thorough and detailed cost of future care expert report.

In *Spehar v. Beazley*, [2002] B.C.J. No. 1718, 2002 BCSC 1004, affirmed [2004] B.C.J. No. 1044, 2004 BCCA 290 the cost of future care award included sums for 38 hours/week of one on one rehabilitation support; rehabilitation case management; avocational consultation; physical conditioning; psychological consultation; pharmaceutical requirements; and interior home maintenance. As in *Walker*, the 16-year-old plaintiff was also given an award for childcare assistance even though the chance that she would have children was quite low:

“In my view, it is highly unlikely that Ms. Spehar will have children. If she should have a child and require assistance, primarily in the area of constant supervision, the award for one-to-one rehabilitation will provide some coverage. Both defence and the plaintiff suggest this is a reasonable head of damage to be compensated. Both agree that the cost should be provided for 13 years. The annual cost is agreed to be in the range of \$15,000 to \$17,000 plus a \$100 agency fee. **I assess this head of damage at \$100,000 considering the most likely contingency that it is a cost that will never be incurred.**”  
[Emphasis added.] (at para. 106)

These detailed analyses are to be contrasted with the cost of future care assessment in *Wilson (Guardian ad litem of) v. Russell*, [1999] B.C.J. No. 2004, affirmed [2000] B.C.J. No. 2346, 2000 BCCA 611. The 16 year old plaintiff suffered profound head injuries and other serious bodily injuries. He was no longer competitively employable, lacked muscle strength, stamina, experienced impaired balance, etc. The medical recommendation was that he live in a residential care complex in a private apartment with medical support, with associated occupational therapy, physical therapy and counselling support. Given the severity of his injuries, it is entirely possible that he required some of the services identified in the decisions discussed above. Yet the nature of the request for cost of future care limited the award.

These cases suggest that the cost of future care award is limited only by what can be imagined as necessary and explained as medically justified. The more detailed the list of needs, the greater the cost of future care award, so long as each expense can be individually justified.

## **Conclusion**

The above discussion has illustrated that although non-pecuniary damages are subject to a cap, plaintiffs in Canada have achieved increased damages by seeking compensation for all the pecuniary losses suffered as a result of their injuries, including loss of interdependent relationship and all possible costs associated with future care. Furthermore, plaintiffs are now seeking compensation in trust for family members who contribute voluntarily to their care. All these developments further the ultimate goal of *restitution in integrum*: restoration of the plaintiff to his or her pre-accident condition, and are additional tools available to the plaintiff's counsel thinking outside of the box.

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