

## Optimal Care v. Institutional Care

By Bill McNally and Bottom Line Research & Communications

There are several recent cases in which the courts have found that the plaintiff is entitled to care that is more costly than institutional care. These decisions have been made within the parameters of the “trilogy” of cases that establish the standards for the assessment of costs of future care for plaintiffs in personal injury cases.

As all readers of *The Barrister* will know, the “trilogy” of cases are three Supreme Court of Canada decisions that established the definitive Canadian framework for the assessment of damages in personal injury cases. The three cases are *Teno v. Arnold*<sup>1</sup>, *Thornton v. School Dist. No. 57 (Prince George)*<sup>2</sup>, and *Andrews v. Grand & Toy*<sup>3</sup>. Both *Teno* and *Andrews* involved plaintiffs who suffered injuries in motor vehicle accidents. The plaintiff in *Thornton* was a high school student who was injured in an accident during physical education class. The plaintiffs in both *Thornton* and *Andrews* were rendered quadriplegic. The young child plaintiff in *Teno* suffered severe cognitive and motor impairment. In all three cases, the evidence brought before the courts clearly demonstrated that home care would be more beneficial to the plaintiffs than institutional care. Additionally, in both *Thornton* and *Andrews* the costs of future care awards determined by the trial judge (to include costs for home care) were significantly reduced by the appellate courts. The rationale for the reduction by both appellate courts was that the costs of home care were too high for the defendants, despite the acknowledgment that home care would have provided much better care for the plaintiffs. This reasoning was explicitly overturned by the Supreme Court of Canada in the trilogy.

In *Andrews*, Dickson, J. stated:

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 assuring that the claims raised against him are legitimate and justifiable.<sup>4</sup>

Mr. Justice Dickson clearly established that the principle of an award for costs of future care is to

compensate the plaintiff for the loss, and provide proper care for the plaintiff's future, which can include home care regardless of the cost that it would entail for the defendant. The most referenced passage from Mr. Justice Dickson's decision is that: "No money can provide true restitution. 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."<sup>5</sup>

The same approach was enunciated by Mr. Justice Spence in *Teno*, where he stated 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."<sup>6</sup> Additionally, according to Mr. Justice Dickson in *Andrews*, because *restitutio in integrum* is not possible for a severely injured individual, a reasonable approach should be taken to ensure that the plaintiff is compensated in such a way that he or she can utilize the award to sustain or improve his or her mental or physical health.

Thus the "adequate care" standard was established by the "trilogy" and provides the cornerstone for analysis on the standard of future care assessments.

The specific phrase "optimal care" was addressed in *Thornton*. Dickson J. noted that witnesses at the trial used the phrase "optimal care" but that such was not to be taken as meaning "the ultimate in care and expense" but rather "an ongoing practical level of orderly care in a home environment." It is important to note that the phrase was used specifically by one witness to illustrate that the life span of a spinal cord injured individual could be that of any other individual with "constant optimal care." Concluding that the essence of the issue is that the plaintiff would live a longer life with "optimal care" Dickson J. found the appellate decision in error in refusing to allow for home care for the plaintiff.

He stated:

In my opinion, the Court of Appeal erred in law in the approach it took toward the standard of care. According to the medical evidence, the very length of life of the

youthful quadriplegic is directly proportional to the nature of care provided. With home care, the injured person can be expected to live a normal, or almost normal, life span. With institutional care, it can be expected that he will not live a normal life span. It is difficult, indeed impossible, to fashion a yardstick by which to measure “reasonableness” of cost in relation to years of life. It is sufficient, I think, for the purposes of the present to say that before denying a quadriplegic home care on the ground of “unreasonable” cost something more is needed than the mere statement that the cost is unreasonable. There should be evidence which would lead any right-thinking person to say: “That would be a squandering of money –no person in his right mind would make any such expenditure.”

The Supreme Court of Canada considered the issue of determining damages for cost of future care more recently in *Krangle (Guardian ad litem of) v. Brisco*.<sup>7</sup> *Krangle* involved a claim of medical malpractice against a physician for failing to advise a couple of testing that could have indicated Down syndrome during pregnancy. The plaintiff couple’s baby was subsequently born with Down syndrome and the plaintiffs argued that they would have terminated the pregnancy if they had been advised of the test and if Down syndrome had been revealed. The parents claimed for damages for the future cost of care of their child. It was submitted that the child would live with his parents until the age of 19 at which point a group home would be in his best interests to allow the maximization of his independence and well-being.<sup>8</sup> The arguments of counsel at the Supreme Court focused on the legislative scheme in the relevant province (British Columbia) as it applied to support the cost of the child’s institutionalised care when he turned 19. The Court determined that it would be the province’s responsibility to provide care for the child at that point. However, McLachlin C.J. stated that in determining the cost of future care, the “courts rely on the evidence as to what care is likely to be in the injured person’s best interest.”<sup>9</sup> As such, each case will present a different story to the court as to what would be best for that particular plaintiff. Furthermore, the Chief Justice went on to state that the “resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require.”<sup>10</sup> Again, the necessary conclusion is that each individual will present his or her own needs to be included in the determination of his or her particular best interests.

A recent Alberta case addressed similar issues. In *Zaifdeen v. Chua*<sup>11</sup> the plaintiff sued the respondents (two physicians) for injuries sustained after she suffered a stroke during a total abdominal hysterectomy. The plaintiff, who was 51 at the time of the operation, suffered significant

physical impairment, including paralysis in her left arm, mild paralysis in the lower left leg, hip pain, impaired balance, visual spatial weakness, mild dysarthria, left side facial droop and trouble focusing and concentrating. The plaintiff sought costs for a live-in-aide whereas the defendants submitted that hourly assistance on a daily basis was appropriate. The trial judge (Perras J.) awarded the plaintiff costs for a live-in-aide given that the plaintiff needed daily assistance with bathing and grooming and other daily requirements.<sup>12</sup> He stated that a live-in-aide would “provide the most flexible and suitable assistance and allow Ms. Zaiffdeen some of the freedom she has lost. I accept this as a reasonable cost under all the circumstances.”<sup>13</sup>

The matter was appealed on numerous grounds, including that of cost of future care. The Court of Appeal affirmed Perras J.’s decision that a live-in-aide was a reasonable cost of future care. The argument put to the Court of Appeal by the appellants (defendants) that the live-in-aide would put Ms. Zaiffdeen in a better position than she would have been in prior to the injury did not alter the award for a live-in-aide. The Court agreed with the trial judge’s analysis of the evidence before him that the live-in-aide would be the most “practical solution “ as it would provide the plaintiff with the care that she needed throughout the day with the “least amount of disruption.”<sup>14</sup> Thus, a determination of what is reasonable can include a consideration of the maximization of the injured party’s freedom and independence and a minimisation of disruption to their daily life.

Another recent medical malpractice decision that analysed the determination of future costs of care in depth is *Fullerton (Guardian ad litem of) v. Delair*.<sup>15</sup> In this case a mother gave birth to a baby who suffered catastrophic brain damage as a result of oxygen deprivation during the birth. The child would be unable to walk on his own, sit or stand without assistance, use his hands or speak. He also would have a reduced life expectancy. In reviewing the case law on the subject, the trial judge gave the following overview: “[T]he purpose of an award for the cost of future care is to create a fund which will be used to sustain or improve the mental and physical health of the injured plaintiff and to put the plaintiff, to the greatest extent possible, in the position he would have been in if he had not been injured.”<sup>16</sup> The decision followed *Krangle* and cites the goal of the courts to determine what care is in the individual’s best interest.<sup>17</sup> The trial judge further adds that there must be a medical justification for the plaintiff’s claims for future care and that for each item included as a

consideration, “the test is whether a reasonably minded person of ample means would incur the expense.”<sup>18</sup> The trial judge then analyses each claimed service or item against this test, such that the needs of the child in question are analysed in light of what a “reasonably minded person of ample means” would do. Thus, for example, even though the family could look after the selection and training of caregivers for their child, the Court found it more appropriate that such tasks be given to an agency (at greater cost), given that a reasonably minded person of ample means would have paid for such a service.<sup>19</sup>

The family was also given an amount of money to renovate a home that would accommodate their child’s special needs<sup>20</sup> based on the same analysis that a reasonably minded individual of ample means would take such action.<sup>21</sup>

Thus, it appears that a court will analyse each item within a claim based on the needs and circumstances of the individual within the “reasonableness” framework established by the trilogy and more recently affirmed in *Krangle*.

A second recent British Columbia case addressed these issues at the appellate level. *Spehar (Guardian ad litem of) v. Beazley*<sup>22</sup> involved a motor vehicle accident that caused the 16 year-old plaintiff multiple injuries, including severe brain injury requiring care for the rest of her life. The trial judge thoroughly analysed the case law arising from the trilogy and *Krangle* regarding the standard of “adequate” future care and the principle of *restitutio in integrum*.<sup>23</sup> Furthermore, as in *Fullerton*, the trial judge noted that the claimant needs to show that there is a medical justification for the claimed costs of future care and that such claims must also be reasonable, as per McLachlin J. (as she then was) in *Milina v. Bartsch*.<sup>24</sup>

*Milina* involved an 18 year old who was rendered a quadriplegic while performing acrobatic ski stunts at a ski show in Toronto. The young plaintiff was awarded costs for his own accommodations and for home care through public agencies as advocated by the defendants rather than private services as sought by the plaintiff.<sup>25</sup>

The trial judge in *Milna* concluded that “adequate” care for this particular plaintiff would be such as to allow her to “sustain and/ or improve her mental and physical health.”<sup>26</sup> “[T]he case law makes it abundantly clear that an injured individual should be compensated so that their ability to live as independently as possible is maximized.”<sup>27</sup> The appeal decision of *Milina* affirmed the trial judge’s conclusion that the injured individual is entitled to compensation to maximise his or her ability to live as independently as possible.<sup>28</sup>

A final case that involved the determination for appropriate future costs of care for a severely injured individual is *Dryden (Litigation guardian of) v. Campbell Estate*.<sup>29</sup> In this case the 13 year-old plaintiff suffered severe brain injuries following a traumatic motor vehicle accident. His life span was reduced by five to ten years. The Court found it appropriate that he be awarded costs for future home care for the next ten years and thereafter for costs of being in a group home. In reaching this conclusion, the Court had regard to the individual wishes of the plaintiff, who did not want to leave his parents.<sup>30</sup> Additionally, the trial decision took into account the plaintiff’s need for 24 hour supervision and the “objective evidence that home care has been beneficial.”<sup>31</sup>

Thus, courts continue to adopt the framework established by the trilogy in determining what is best for the plaintiff, with a view to maximizing his or her health and well-being. In applying the trilogy tests to each case, a court will take into consideration the particular needs, concerns, values and situation of each plaintiff. A court may therefore find that a plaintiff is entitled to costs for optimal and not institutional care if that is the best situation for him or her.

## ENDNOTES

---

1 [1978] 2 S.C.R. 287  
2 [1978] 2 S.C.R. 267  
3 [1978] 2 S.C.R. 229  
4 p. 243  
5 p. 261  
6 p. 320  
7 [2002] 1 S.C.R. 205; [2002] S.C.J. No. 8 (Q.L.)  
8 para. 26 Q.L.  
9 para. 21 Q.L.  
10 para. 22  
11 (2004), 358 A.R. 274 (Q.B.); [2004] A.J. No. 513 (Q.L.), aff'd [2005] A.J. No. 1175  
12 (C.A.)(Q.L.)  
13 para. 93 Q.L.  
14 para. 93 Q.L.  
15 para. 42 Q.L.  
16 [2005] B.C.J. No. 1920 (B.C.S.C.) (Q.L.)  
17 para. 261 Q.L.  
18 para. 262 Q.L.  
19 para. 263 Q.L.  
20 para. 287 Q.L.  
21 para. 297  
22 para. 297 Q.L.  
23 (2004), 31 B.C.L.R. (4<sup>th</sup>) 223 (C.A.); [2004] B.C.J. No. 1044 (Q.L.), aff'g [2002] B.C.J.  
24 No. 1718 (S.C.)  
25 para. 55 Q.L. trial decision  
26 (1985), 49 B.C.L.R. (2d) 33 (S.C.); [1985] B.C.J. No. 2762 (Q.L.), aff'd (1987), 49  
27 B.C.L.R. (2d) 99 (C.A.); [1987] B.C.J. No. 1833 (Q.L.) (para. 99 Q.L.)  
28 paras. 221-222 Q.L.  
29 para. 77  
30 para. 89  
31 para. 23 Q.L.  
(2001), 11 M.V.R. (4<sup>th</sup>) 247 (Ont. S.C.J.); [2001] O.J. No. 829 (Q.L.)  
para. 176 Q.L.  
para. 176-77 Q.L.