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# TRAUMATIC BRAIN INJURIES AND COST OF FUTURE CARE: ONTARIO VS. BRITISH COLUMBIA

## Richards Buell Sutton Insurance Law Newsletter

By RBS Lawyers

Here is some unfamiliar territory for British Columbians: looking beyond our own border for the source of an unusual and surprising legal trend. But apparently there is such a trend in Ontario (in awards for bodily injury): soaring awards from juries for cost of future care in Traumatic Brain Injury cases.

The Ontario Decisions The issue is brought to the fore by two astonishing jury awards, both challenged in the Ontario Court of Appeal. In the first, *Sandhu v. Wellington Place Apartments*, 2008 ONCA 215, the Defendants challenged a jury award that followed a 2006 trial. The Plaintiff was just two years old when he fell from an apartment window in 2006. According to the Court of Appeal, which gave reasons in the spring of 2008, he suffered a brain injury "so severe that he will never be gainfully employed and will always require supervision". The jury awarded $10.9 million for cost of future care, fully $ 1.3 million more than the Plaintiff had even asked for.

In the second case, *Marcoccia v. Ford Credit Canada Limited*, 2009 ONCA 317, the jury returned a whopping future care award of almost $14 million. This, apparently, was 96% of the maximum sought by the Plaintiff. The Plaintiff was age 20 when injured in an MVA. He suffered diminished executive functioning, and a host of physical, psychological and emotional impairments that would render him in need of full time care and competitively unemployable for life.

Fighting your battles in the Court of Appeal is fine if you were the big winner at trial. If you are trying to undo a disaster, the experience is quite different. Nevertheless, it is at least somewhat surprising that both of these massive future care awards were upheld by the Ontario Court of Appeal.

In *Sandhu*, the defence argued on appeal there was no expert evidence led that would permit the jury to reach the conclusion it did, in particular on the $1.3 million dollar award above the requested amount. But the Court of Appeal found such evidence. The Plaintiff's actuary had explained to the jury that they could adjust his numbers upwards or downwards. There was evidence also that some of the care-givers at issue might charge rates higher than those used by the actuary, and this alone, over time, could have raised the numbers higher than the amount requested. Finally, the defence argued that the cumulative effect of

the jury having awarded the maximum sought under each head of damage meant the trial must have been unfair and the verdict unreasonable. The appeal court described this as a "startling proposition". Of note, the Court went on to say that the award was "within the appropriate range of damages awarded in similar cases".

In *Marcoccia*, the defence expert's scenario on future care proposed a total cost of only $2 million. Interestingly, on appeal, the defence conceded that $11 million would have been a reasonable result, but was unable to undue the trial decision. According to the appeal court, the jury actually applied deductions to the numbers presented by the Plaintiff.

Back to British Columbia

Recently in B.C., we have not seen challenges in the Court of Appeal to future care awards of over $10 million, apparently because these awards are not being made at trial. In *MacEachern v. Rennie*, 2010 BCSC 625 (trial by judge alone) a 27 year old woman suffered significant brain injuries that would cause her to require care for the rest of her life. Like the plaintiffs in the Ontario cases, she was ambulatory and able to function at least at a minimal level. The case was unusual in that the Plaintiff had pre-existing psychiatric and addiction issues and in fact had been living in a tent before the accident. After careful analysis, damages for cost of future care were assessed at $5.275 million, rejecting the Plaintiff's submission that the right number was $10 million. With regard to future living arrangements, the trial judge chose the cheaper option of group assisted living as opposed to independent living with 24 hour care, and opted for an additional care aid support of only 4 hours per day, rather than 8 hours sought by the Plaintiff. The court also rejected 12 hours of personal nursing per day, opting instead for two hours, knocking well over $100,000 off of the nursing costs sought by the Plaintiff. These and other deductions had significant impact on the quantum.

In *Ediger v. Johnston*, 2009 BCSC 386, complications at birth left the Plaintiff with the mental capacity of a 4 – 5 year old, and in need of round the clock care. Her life expectancy was only to age 38. The court awarded approximately $2.15 million for future care, which presumably would have more than doubled had she had a normal life expectancy. Still, even accounting for such an increase, the sum is a far cry short of the Ontario awards. It should be noted that the Plaintiff in *Ediger* had a very supportive family who wished for her to live with them for as long as possible. The result of the initiative to live at home was an award of over $200,000 for renovations to the home, but nothing for future "in trust" claims for the parents (the total past "in-trust" award to the parents was $175,000). The court found it likely that as the Plaintiff entered adulthood, they would see the group home setting as the preferred option, but this contingency was factored into the over-all future care award.

*Cojocaru (Guardian ad Litem) v. BC Women's Hospital*, 2009 BCSC 494, was another medical malpractice case involving complications at birth, in 2001. The resulting brain injury was devastating and attracted non-pecuniary damages at the upper limit. At age six, the Plaintiff did not walk or talk and could not feed himself. The damage was permanent but some gains were possible. Although the reasons for judgment do not examine the individual care expenses in detail, there was evidence the Plaintiff would never live independently as an adult. The Plaintiff presented evidence that the cost of future care was $3.8 million. The court accepted this, but applied a 30% contingency because the Plaintiff had some prospect for limited improvement and had a driven mother who would ensure that possible improvement was maximized. The final future care award was $2.66 million, with an "in trust" award for the mother at $144,000.

Why the Difference? These are always tragic and emotional cases, and when placed before a jury the true exposure can be difficult to predict according to conventional legal analysis.

Unfortunately, with the Ontario cases decided by a jury, there are no reasons for judgement to compare with B.C. decisions, other than the reasons on appellate review. It does appear, however, that plaintiffs are throwing larger future care numbers at the courts in Ontario than in B.C. It is also clear that the BC trial judges are employing principled and practical approaches to future care claims in order to keep the quantum in check. It may well be that in the Ontario cases, there was nothing more the defence could have done differently to hold back the generosity of the sympathetic jury.

Practical Considerations for Insurers Insurers instructing counsel on such cases, regardless of the province, should bear in mind a number of issues. First, there may be merit in challenging a jury notice filed by the Plaintiff. Second, defending future care awards requires meticulous preparation to ensure the contents of the "crystal ball" are not obscured: negative contingencies and life expectancy issues must be addressed appropriate expert evidence, not left to the common sense of the court. Excessive care that is not medically justified, or that is nothing more than further compensation for loss of amenities (and already paid as non-pecuniary loss), must be exposed as such. Deductions should be sought for duplication with government sponsored programs (this a weighty subject on its own). The challenge, according to the Ontario experience, is to keep the jury on-side with the obvious utility of such arguments when we all know where the sympathies naturally lie.