

Practical Strategies for Proving Future Care Claims

Presented by:

Rikin Morzaria

Partner, McLeish Orlando LLP

416-366-3311

rmorzaria@mcleishorlando.com



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THOMSON ROGERS

PERSONAL INJURY LAWYERS

The Appropriate Level of Care

Subsistence:

- What a plaintiff can make do with

Community Care:

- (Akin to public health care) taking into account expenditure of limited public funds

Full compensation

- Full measure of home-based care

Cadillac:

- Highest level of care possible – everything that a victim could wish for or absorb



What is “Full Compensation”?

“The plaintiff has no duty to mitigate in the sense of being forced to accept less than the real loss.”

“It cannot be unreasonable for a person to want to live in a home of his own”

Key Question:

“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?”



Professional vs. Non-Professional Caregivers

It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle.

- *Vana v. Tosta*, [1968] S.C.R. 71



Professional vs. Non-Professional Caregivers

If the mother did not meet his demands when Tony was at home then help in the form of something akin to a paid baby sitter would have to be obtained. Tony's entitlement to recover for the reasonable cost of such care cannot be denied because the necessary care and assistance has been provided by a member of his immediate family

- *Yepremian v. SGH*, (1980) Ont. CA



Impact of Available Public or Charitable Programs

programs of government assistance really can not be counted on to endure. It seems to me to be obvious that John Stein's award for future care should not be diminished based upon the uncertain expectation of government help. It appears that the alternative pools of funds of which McLaughlin, J. spoke in *Ratyck v. Bloomer*, [[\[1990\] 1 S.C.R. 940](#) (S.C.C.)] are drying up.

- *Stein v. Sandwich West* 1993 (Ont. Gen. Div.)
aff'd by Ont. C.A.



Impact of Available Public or Charitable Programs

[57] In the present case, the funded devices for alleviation of the disadvantages of hearing loss would not seem to be unusual or experimental and hearing impairment is a common disability that one can hardly imagine a government losing interest in assisting. Still, government policies change with the temper of the times and Jaime has a long time ahead of her. I find she must have the benefit of the doubt, as government funding cannot be reliably predicted.

**- *Paxton v. Ramji* (2006) (Ont. S.C.J.)
aff'd 2008 Ont. C.A.**





Practical Strategies & Considerations:

Making Full Compensation a Reality

Quantity of Attendant Care:

Establish the Harm When Care is Insufficient

... was too embarrassed to pass this example along to you. She asked me to do it on her behalf.

When gets a cold she needs to get an antibiotic into her system ASAP because she runs the risk of

This is exactly what happened when she was here yesterday. She had a "little accident" while she was in her bed. She is here every Tuesday for physio with Marianne. uses her equipment on the lower level because it will not fit into her apt. After physio, she will either have a bite to eat and then a rest or she will have a rest and then a bite to eat. Either way, she is usually here until 10pm or so. Then we drive her back to her apt.

I took care of the clean up after Laurie and I dropped her off at her apartment. There, she had her night time attendant and a clean bedroom and bathroom.

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I should also mention that the same scenario occurs each time she goes to the dentist. Once again, she needs to take an antibiotic before her appointment. Her replacement parts require this safeguard. If not, she runs the risk of infection.

Agency vs. Direct Hire: Making the Disabled Plaintiff an Employer




Quality of Attendant Care: Skilled vs. Unskilled Caregivers

Post MVA-

Anais found out about the accident through a briefing session before she met Jane Doe. She was told that Jane Doe was in an accident on August 2, 2002, and that she was dead on arrival at Sick Kids Hospital, placed into a medically induced coma, underwent 6 hours of brain surgery, suffered a L4 fracture, right fracture to her frontal lobe, and was put in a body cast for 3 months. Jane Doe and Anais have discussed the accident. Jane Doe told Anais that the seatbelt

In around 2005, Anais' role changed, she started to go to school with Jane Doe. Jane Doe's teacher retired in June of 2005 (Teacher was Susan Bright – acquired brain injury - head of the staff) Anais went to class with Jane Doe everyday and assisted her in the classroom, with various tasks including: schoolwork, homework, keeping focus and monitoring behaviour.

was assigned by Jane Doe's physiotherapist, Ricky Yamada, with York Rehab Assoc – 730 Davis Drive in Newmarket – Gave them list of exercises to be completed twice a week.) Anais would pick Jane Doe up at Dennison High School in Newmarket, take her to resort, do the exercises, and then they would go for a hot tub and Anais would drop her off at Home.



not meet Jane Doe until 2004. By that time Jane Doe had finished all of her hospital stays except for recent MacMaster visit and hospitalization for her low potassium levels. Anais did not see the body cast, she has no knowledge of the body cast beyond what she is told by Jane Doe and the Doe family.

Quantity of Attendant Care: Minimum Blocks of Time

supervision is offered by teaching and support staff, and by the rehabilitation support worker who is hired to work with her and also providing tutoring services during this time period. *Availability* of attendant care services is required on a constant basis, as these would be required if she did not attend school or a scheduled therapy session on any particular day and if she returned home early. Similar to Dr. Voorneveld, Dr. Gates recommended that [REDACTED] be supported by a Youth Worker when not in the care of her parents.

The services listed below are currently being provided by [REDACTED] mother, her current attendant care provider:

- Basic supervision – As outlined above, [REDACTED] is dependent upon cuing and prompting for her personal care routines and thus requires attendant care support to ensure completion of personal care tasks. She requires supervision for showering due to her reported experience of dizziness and the frequent incidence of seizures to ensure her safety. As a result of her presenting emotional, behavioural, and cognitive impairments, she clearly does not have the capacity to respond appropriately to an emergency, placing her at significant risk if she did not have an attendant present at all times.
- [REDACTED] requires the assistance of an attendant to facilitate daily planning and impose structure on her day. This support with her daily activities is required to ensure a reasonable quality of life in the context of her severe neuro-cognitive deficits. This support is also a means of accommodating/compensating for her impaired ability to self-determine/plan/initiate actions, make decisions, choose direction, and/or make judgements.
- Under supervision from the Physiotherapist [REDACTED] requires supervision and assistance

attendant to be present).

- The client lives in a small rural town in southern Ontario, and her therapists come from more major centres to conduct her one-hour therapy sessions. In coordinating attendant care, the attendant would not leave the home for one hour (most companies charge a minimum of three hours per shift) and then return after the therapy is finished.

and maintenance of social relationships.

Other practical considerations influencing the presence of a 24-hour attendant include:

- There is the potential that a therapy session may be cancelled (with the resulting need for the attendant to be present).
- The client lives in a small rural town in southern Ontario, and her therapists come from more major centres to conduct her one-hour therapy sessions. In coordinating attendant care, the attendant would not leave the home for one hour (most companies charge a minimum of three hours per shift) and then return after the therapy is finished.
- [REDACTED] may have a need for emotional / behavioural support during the therapy sessions, necessitating intervention.

THANK YOU

Please feel free to call or email with questions

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Partner, McLeish Orlando LLP

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