

DAMAGES RELATING TO CHILDREN

Presented at the Ontario Trial Lawyer's Association, Fall Conference, 2009

DEREK G. NICHOLSON

beamentgreen

I N D E X

	<i>Page Nos.</i>
Part 1 - General Damages	
A- Non-Pecuniary General Damages for Injured Children - The "CAP"	2
B- General Damages for Deceased Children Under s.61(2)(e)	6
Part II - Pecuniary Damages	
A- <u>Future Loss of Income</u>	
1) Creating the Future Loss of Income Model	13
2) Reliance on Statistics	17
3) Lost Years Claims	18
4) Discount for Contingencies	20
B - <u>Future Cost of Care Issues</u>	
1) Attendant Care - Proper Development of the Claim - "The Big Enchilada"	23
(a) Proving the Need for Attendant Care	25
(b) Quality of Attendant Care	27
Examples of the Models and Items Considered in Attendant and Future Costs of Care Claims	29
2) Adaptable Homes, Renovations, Acquisition and Moving Costs	32
3) Housekeeping and Handyman Claims	33
4) Creative or Unusual Expenses	34
5) Discount Rate Adjustment Under R.53.09	34

C - Post Trial Damages Issues

1) Investment and Management Fees Related to Management of Settlement Funds of a Person Under Disability	36
2) Guardianship Order, Management Fees and Future Legal Costs	36
3) Henson Trusts	40

D - <u>Statutory Accident Benefits Claims (SABs)</u>	42
--	----

Appendices

Calculation of Damage Awards: A Selection of Case Law, Maryse Larouche, GML Actuaries	A
Sample Henson Trust	B
S.A.B.S., Beament Green Client Handout Form	C
Beament Green: Injured Child Assessment Intake Form	D
Living Minor Plaintiffs, Table of Damages	E
Deceased Minor Plaintiffs, Table of Damages	F

DAMAGES RELATING TO CHILDREN

Written by Derek Nicholson, Tania Astorino, Megan Murphy

Introduction

This paper is an overview of various issues relating to maximizing the recovery of damages for injured or deceased children.

The challenges facing counsel in developing damages claims for children are similar to that of an adult but more challenging. Unlike an adult, a child will not have an established work history and in cases of very young children will not have any academic history or stated interests upon which to base a predictable career path.¹

Tort Claims

This section will review by category of damages, developments in the law and the creative efforts of counsel which have resulted in significant increases in the size of damage awards for injured children as seen in *Crawford v. Penney*² and the “cluster cases.”³

¹ Roger G. Oatley & John McLeish, *The Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases*, (Aurora: Canada Law Book, 2008) at 430:

“For the most part, the damage work up and presentation at Trial will be similar for a child to that of an adult. Accordingly, the principles set out previously will generally apply. These cases are, however, usually more difficult. To be successful, it is necessary to prove claims that look in the future to a degree that is not required in an adult case. Where the two are likely to differ the most is with respect to future earnings.”

² *Crawford v. Penney*, [2003] O.J. No. 89, 14 C.C.L.T. (3d) 60 (S.C.).

³ The cluster cases are the following: *Sandhu v. Wellington Place Apartments*, (2008) 291 D.L.R. (4th) 220, 164 A.C.W.S. (3d) 803 (Ont. C.A.), *Morrison v. Greig*, [2007] O.J. No. 225; 46 C.C.L.T. (3d) 212, (S.C.); *Marcoccia v. Gill*, [2007] O.J. No.1333; 156 A.C.W.S. (3d) 831 (S.C.) [*Sandhu*], [*Morrison*], and [*Marcoccia*].

Part I - General Damages

A. *Non-Pecuniary General Damages - For Injured Children - The “CAP”*

It appears that the beginning and end point for the discussion of non-pecuniary damages in terms of maximum awards is the Supreme Court of Canada Trilogy of cases decided in 1978.⁴ These cases established an “upper limit” or “CAP” on general damages of \$100,000 for pain and suffering, loss of amenities of life. In *Lindal v. Lindal*⁵ the Supreme Court of Canada confirmed that the CAP amount should be allowed to grow with inflation. The CAP is now estimated to be calculated at **\$324,641 as of March, 2009.**

In October, 2006 the Supreme Court of Canada, without reasons, refused leave to appeal the issues of the CAP in *Lee v. Dawson*.⁶ It appears unlikely that any attack in the near future on the CAP will succeed.

The *Lee* case involved a challenge to the CAP which arose out of a \$2,000,000 non-pecuniary general damage award given by a B.C. jury. For some reason the Jury was not instructed on the CAP. Mr. Lee was catastrophically injured at 17 years of age when lumber fell from a transport truck crushing the vehicle in which he was a passenger. He sustained a severe traumatic brain injury, a major chronic depression, extreme facial scarring and extreme psychological problems exacerbated by his serious facial scarring. His Korean culture viewed disabled and mentally ill people as shameful for both the

⁴ *Teno v. Arnold*, [1978] 2 S.C.R. 287; *Thornton v. School District No. 57*, [1978] 2 S.C.R. 267; *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229 [Andrews].

⁵ *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

⁶ *Lee v. Dawson*, (2006) BCCA 159; [2006] B.C.C.A. No. 679, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 192 [Lee].

victim and his family. This made his injury all the more devastating.

The jury award of \$2,000,000 was seen to be a reflection of the community's assessment of the value of the compensation that should be awarded to this young man for pain, suffering and loss of amenities of life. The Trial Judge felt bound by the CAP and substituted the CAP for the jury award. The Judge did so even though Plaintiff's counsel pointed out that if the CAP were applied, and given the Plaintiff's 60 year life expectancy, he would ***"receive the equivalent of \$13.69 a day, or less than the current price of a movie and a bag of popcorn"***.⁷

The Appeal to the British Columbia Court of Appeal (and subsequent denial of leave in October of 2006) included a Section 15 challenge under the Charter of Rights and Freedoms⁸ which failed as well as challenges generally both by the Plaintiff and an Intervenor (the *British Columbia Coalition of People with Disabilities*).

The reasoning behind the CAP is best put forth in a quotation from *Mr. Justice Dickson* in *Andrews* in two passages:

There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. Money can provide for

⁷ Bogoroch, Richard M. and Kate L. Cahill, "Are Damage Awards on the Rise? Learning Cold Hard Lessons from Recent Negligence-Based Litigation" (Paper presented to the Canada Institutes 10th Annual Reducing the Risk of Hospital Liability Best Practices for Managing Risk, Adverse Events, and Costly Litigation, February 27, 2007) at pages 5 and 6.

⁸ *Lee, supra* note 6 at para. 42.

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 [emphasis added].⁹

Dickson J. further extrapolates on his rationale for the cap by saying that:

If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities. The money for future care is to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Additional money to make life more endurable should then be seen as providing more general physical arrangements above and beyond those relating directly to the injuries. The result is a coordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss compensation.¹⁰

Obviously this has led to fairly creative approaches by Plaintiff's counsel in focusing their attention on pecuniary damages and more particularly "***adequate future care***". In addition, creative Plaintiff's counsel have also successfully moved damages from a category of general non-pecuniary using innovative approaches such as the "*lost years approach*" noted below.

The use of the CAP has raised some issues in assessing damages. Defense counsel have often urged the Courts to assess down from such catastrophic injuries as quadriplegia to reduce the general damage awards. In Sandhu, the Court of Appeal confirmed that the "CAP" ". . . ***is not to be used as a scale against which non-pecuniary claims for all other injuries are to be measured... In other words, it is inappropriate to evaluate Harvinder's injuries solely on the basis of some notional***

⁹ *Andrews v. Grand and Toy*, [1978] 2 S.C.R. 229, at page 261.

¹⁰ *Ibid.* at page 262.

comparison with an imagined worse case scenario"¹¹ The Court went on to confirm that each case is to be dealt with on its own individual factual circumstances.

Attempts by defense counsel to reduce the limits on the basis that the money could serve "no useful purpose" for a completely disabled person have been rejected. *Mr.*

Justice Power expressly rejected the same in *Crawford*.¹²

In addition, an argument that there has been a "*risk of double recovery*" of the maximum award by reason of interest being added in accordance with the *Courts of Justice Act* on top of the ever increasing inflation CAP has also been rejected in the same case.¹³

¹¹ *Sandhu (Litigation Guardian of) v. Wellington Place Apartments*, 2008 ONCA 215 at para. 25.

¹² *Crawford*, *supra* note 2 at 4.

¹³ *Ibid.*

B. General Damages for Deceased Children under s.61 (2)(e)¹⁴:

At common law no right of action existed for negligently caused death.¹⁵ The repugnant result was reformed in 1846 in legislation preceding the *Fatal Accidents Act*.¹⁶ This legislation was generally interpreted to allow damages for pecuniary loss only.¹⁷ Pecuniary loss consisted of support services or financial contributions which the claimant might reasonably have expected had the deceased not be killed. With children that value was generally negated by the costs associated in raising them leaving no award.

The implementation of the *Family Law Act* amendments in March, 1978, created heads of damage for both pecuniary and non pecuniary damages. Most significantly the ability to claim for loss of guidance, care and companionship.

Mason v. Peters (1982)¹⁸ was the first decision involving a fatality under the new legislation. Darrin Dwayne Mason was an 11 year old boy at the time he was killed by an automobile near Cobourg, Ontario in 1978. He was found by the Trial Judge to have been "a remarkable boy" who did a "man's work" to help his mother Darlene Mason. She was a single paraplegic, deserted by her spouse, and found to be very dependent on her son Darrin for almost everything from lawn cutting, warming up the car, assisting his mother in the wheelchair, etc.

¹⁴ *Family Law Act*, R.S.O. 1990, CHAPTER F.3, s. 61(2)(e).

¹⁵ *Baker v. Bolton* (1808), 1 CAMP 493, 170 E.R. 1033.

¹⁶ *Fatal Accidents Act*, R.S.O. 1937, CHAPTER 210.

¹⁷ *Mason v. Peters* (1982), 39 O.R. (2d) 27 (Ont. C.A.) at para. 12.

¹⁸ *Ibid.*

Mr. Justice Robbins of the Ontario Court of Appeal welcomed the new legislation as representing " .. ***an important step forward in cases involving the wrongful death of minor children. Pecuniary loss concepts have proven excessively restrictive in these cases and have produced awards wholly incommensurate with the true loss sustained by a child's death...***".¹⁹

The legislation was hailed as providing an "***effective basis for more realistic and just damages than those awarded under the Fatal Accidents Act for tortious violations of this family relationship.***"²⁰

Despite the creation of a basis for non-pecuniary claims, the award was still intended to "***exclude grief, sorrow and mental anguish suffered by reason of the death as compensable items of damage.*** Non-pecuniary loss of this kind, unlike guidance, care and companionship ..." ²¹ was not provided for in the new Legislation and *remains "non-recoverable".*

The Court of Appeal upheld a non-pecuniary award of \$45,000 to the Mother and \$5,000 to the deceased's sister. The decision was one of the highest damage awards given for the death of a child until recently.

¹⁹ *Mason, supra* note 17 at para. 35.

²⁰ *Ibid.*

²¹ *Ibid* at para. 40.

In 1996, the Supreme Court of Canada considered the factors to examine assessing non-pecuniary damages when it heard the appeal of *Augustus v. Gosset*²². A teenager was killed by a police officer in Quebec and his mother sought damages for *solatium dolaris* under the *Civil Code of Lower Canada* and damages for loss of life expectancy under ss. 1 and 49 under the *Quebec Charter of Human Rights and Freedoms*.

Justice L'Heureux-Dube reviewed the non-pecuniary damage awards given across Canada and concludes specific criteria were needed:

"Bearing in mind that a parent's grief over the death of a child can never be compensated adequately, the assessment of the moral prejudice in such painful cases, as in others, nevertheless depends on the assessment of the evidence presented to the court. From this perspective, it is especially appropriate to develop criteria which preserve, if only slightly, the objectivity of this process. While remaining sensitive to the particular circumstances of each case, such a process cannot ignore the limits of the principle of restitution in integrum in this area in which moderation and predictability must always be fostered."²³

The factors the Court gave in assessing non-pecuniary damages were the following:

1. the circumstances of the death;
2. the ages of the deceased and the parent;
3. the nature and quality of the relationship between the deceased and the parent;
4. the parent's personality and ability to manage the emotional consequences of the death;

²² *Augustus v. Gosset*, [1996] 3 S.C.R. 268.

²³ *Ibid* at para. 1.

5. the effect of the death on the parent's life in light of the presence of other children or the possibility of having others.²⁴

Despite the development of these factors, non-pecuniary damage awards have not significantly increased and the factors have not been applied uniformly by lower courts.

The cases following the 1996 Supreme Court of Canada decision in Augustus are summarized in the attached Schedule "A".

***Cultural Impact and Current Upper Limit:
To vs Toronto Board of Education (2001)²⁵***

In this case a 14 year old Grade 9 student was crushed by a handball net while doing pushups at school.

The evidence confirmed this first born son culturally occupied an important role in a Vietnamese family. It was expected that the first born son would excel scholastically, graduate from University, obtain highly remunerative employment, be obedient and provide financially and socially for his parents and his sister. He did in fact assist his Father who could not read English by acting as a translator. He was his Father's trusted companion and advisor, his relationship with his sister was almost paternal. He was responsible for ensuring her homework was done and caring for her while his parents worked long hours in the family business.

²⁴ *Augustus*, *supra* note 23.

²⁵ *To et al. v. The Toronto Board of Education et al.* (2001) 204 D.L.R. (4th) 704.

The death had a devastating effect on the remaining members of the family. The boy was not buried for three weeks until an appropriate date in the Chinese calendar was reached. His family moved out of the home for a year, traveling every weekend to light incense. They prepared his favourite foods believing that his spirit could still smell them. The Mother risked her own health by trying to have another son. After failing with that she underwent a hysterectomy. She volunteered divorce to her husband as she could no longer bear him a son. The Jury concluded that a \$100,000 general damage award for loss of care, guidance and companionship was appropriate for each of the parents. They awarded the sister \$50,000 which was reduced by the Court of Appeal to \$25,000.

In reviewing the matter the Court of Appeal commented:

"I regard the existing disparity in guidance, care and companionship awards as the inevitable result of choices made by the Courts and the Legislature. The Courts could have established conventional guidance, care and companionship awards, or could have imposed rough upper limits as the Supreme Court of Canada did in respect of non-pecuniary general damages in personal injury cases . . . That has not happened. Alternatively, the Legislature could have moved towards a legislative scheme such as exists in Alberta .. ."²⁶

The case is also of significance in recognizing the importance of the cultural impact on assessing loss of care guidance, and companionship.

This decision is the high water mark in awards of damages for deceased children. In subsequent cases such as Osman v. 629256 Ontario Limited²⁷ the case of *To* is cited as a reference point. It undoubtedly influenced the Court in *Osman* in awarding \$80,000 for the loss of their 16 year old son for loss of care, guidance and companionship after

²⁶ *To*, *supra* note 25 at para. 29.

²⁷ *Osman v. 629256 Ontario Limited*, [2005] O.J. No. 2689 (S.C.J.).

he was stabbed to death in a nightclub. The action was against the man who stabbed their son, Guled, the owner of the club and security service providers of the nightclub. The Judge also awarded \$20,000 for each of Guled's 5 siblings.

In assessing the claim *Sach J.* quoted the Court of Appeal in *To* as follows:

"The Court of Appeal also re-iterated some key principals to keep in mind in making an award of this kind:

- 1. The death of a child is not a loss that can only be measured in monetary terms. "The most significant loss suffered, apart from the sorrow, grief, and anguish that always ensues from such deaths, is not potential economic gain, but deprivation of the society, comfort and protection which might reasonably be expected had the child lived - in short, the loss of the rewards of association which flow from the family relationship and are summarized in the word 'companionship'."***
- 2. Each case must be given separate consideration and triers of fact must do the best they can to assess damages for such a loss in light of the particular family relationship involved.***
- 3. Guidance, care and companionship compensation must be assessed in an objective and unemotional way."²⁸***

²⁸ *Osman*, *supra* note 27 at para. 14.

Of interest is a calculation of the per diem value of the awards in Canadian decisions for parents/siblings of deceased children considering the joint life expectancies of the parents with their deceased child. As can be seen the compensation is extremely disappointing. The per diem compensation is between \$1.17 to \$5.52 as calculated by *Maryse Larouche*, F.S.A., F.C.I.A, (GML Actuarial Services, Ottawa) (Appendix "A").

Part II – Pecuniary Damages

There are too many potential issues relating to future loss to be the subject matter of this paper. However, a number of important issues have been dealt with recently by the Courts and are dealt with below under the various subject headings.

Future Pecuniary Damages

The starting point with young children, especially those that are not old enough to attend School, is best described by Mr. Justice Power's quotation from *Crawford v. Penney* (2003) as follows:

"The Court does not have the advantage of considering any evidence of pre-accident earnings or the level of ability or intelligence of the infant Melissa to assist in determining what level of education she might have attained or what amount of income she would have earned. Accordingly, I must, in order to reach a reasonable decision, consider the earning capacity and intelligence of her parents and siblings."²⁹

²⁹ *Crawford*, *supra* note 2 at para. 292.

In this case, Melissa was severely brain injured during birth as a result of medical malpractice and was incompetent right from birth as a result thereof.

A. Future Loss of Income

1) Creating the Future Loss of Income Model

As *Mr. Justice Power* said in the *Crawford* decision, the Court does not have the advantage in many infant cases of considering pre-accident earnings, levels of ability or intelligence especially when the injured infant is very young or is injured as birth. Consequently the challenge facing counsel and Courts alike is determining what is a fair and reasonable model of what might had been expected in terms of the infant's career path and consequent future income loss.

The *Crawford* decision was particularly challenging as the infant Plaintiff Melissa was catastrophically injured at the time of birth. *Mr. Justice Power* confirmed that the appropriate approach followed in many cases was to examine the “*earning capacity and intelligence of her parents and siblings.*”³⁰ An agreement was reached that a proper reference point was a “Community College” graduate with the statistical average income for a female work in the Province of Ontario.

³⁰ *Ibid.*

In Morrison v. Greig³¹ the Court examined a future economic loss model for Derek Gordon by examining past school performance which was poor. *Mr. Justice Glass* took into account that Derek had advised his parents he intended to complete high school and take on an apprenticeship program for a tool and dye maker. There was debate at Trial as to whether or not he would have been employed as an unskilled laborer or proceed in achieving the income level of a tool and dye maker. Evidence that his brother and brother-in-law were tool and dye makers and that he had worked for a company on a probationary basis in that field was of assistance to the Court. The fact that his parents were University graduates taken together with his efforts to community based educational training to complete his high school credits persuaded the Court that there was a “*strong likelihood that he would have undertaken tool and die making as a working career*”.³²

In addition to the history of this individual and his family members, expert *vocational* evidence was considered as presented by both Plaintiff and Defendant. This model was then used to project future loss of income.

The companion action of Ryan Morrison in Morrison v. Greig³³ involved the same examination by *Mr. Justice Glass*. The Court heard evidence and accepted that this Plaintiff was a “hands on person”. He had been involved in landscaping. On the other hand, he had the potential to work in his Father’s glass and mirror sales company and

³¹ *Morrison v. Greig*, [2007] O.J. No. 225; 46 C.C.L.T. (3d) 212, (S.C.).

³² *Ibid*, at para. 62.

³³ *Morrison*, *supra* note 31.

eventually could have taken it over. The Court considered that the Plaintiff was a poor student. He had also considered vocational expert evidence and came to the conclusion the most likely course of employment and career for Ryan would have been to take his Father's business over. This would have allowed for an income projection of \$44,000 for the first three years; \$64,000 for year's four to nine and \$84,000 for the balance of Ryan's working life.

In developing a model demonstrating loss of earning capacity, a complete and accurate history is necessary if the children are of sufficient age to have an education or background and/or some employment history (See draft checklist attached as an Appendix). All of this information may assist in developing a theory that the infant Plaintiff has or will lose employment opportunities. If a child's career choices have been narrowed or they are put at a disadvantage for earning future income then that evidence must be developed. Often injured children will lose several years before they can complete their educational requirements. Even if they are able to return to the market place evidence will have to be developed to demonstrate what economic loss they will suffer. In addition, it is often the case that future potential has been reduced and higher income level jobs are not available. Obviously vocational experts will be required to demonstrate this based on the educational background, marks obtained and current injuries.

In addition, even if the infant is ultimately able to work there may be an impact in the retirement date because of residual problems arising from the injuries. Potential

retirement dates can significantly impact the quantum of damages for future loss of income.

In Sandhu the Court of Appeal dealt with the issues raised on Appeal which was the retirement date which the Jury had selected, age 65 rather than age 62. The Court of Appeal relied on Segal's evidence as being a basis upon which it was entirely open to the Jury to select 65 as the appropriate age of retirement. Mr. Segal said on re-examination:

"I do hundreds of these a year, and it still seems that 65 is the accepted level of retirement. It is lower statistically because as I said, a lot of people with teachers' or government pensions can retire earlier, but we find now that they are legislating to remove mandatory retirement ages and people are tending to work a little more out of financial need, if nothing else."³⁴

In the Crawford decision Mr. Justice Power considered expert evidence on statistical retirement ages for females in Ontario and found:

"It would reasonable to assume that Melissa would have retire at age 60."³⁵

2) Reliance on Statistics

This is an issue that is of significance in calculating future loss of income. Many sorts of statistical information can and have been used in attempting to build or reduce future damage awards. The appropriateness of the statistics will obviously be considered in each case. Mr. Justice Power rejected National employment statistics for female

³⁴ *Sandhu*, supra note 11 at para. 42.

³⁵ *Crawford*, supra note 2 at para. 299.

workers in favour of similar Ontario statistics as he determined they were more appropriate to predict Melissa's probable future career path³⁶.

This topic was extensively dealt with by *Gary Principe* at the 2008 OTLA Fall Conference in his paper entitled "*Proving Economic Damages*".³⁷ Mr. Principe's evidence was extensively relied upon by Mr. Justice Glass in deciding the *Morrison/Gordon v. Greig*.

"HALS" & "PALS" assists in developing projected claims for future loss of income. "HALS" (1991) (*Canadian Health and Activity Limitation Survey* conducted by Stats Canada) is a study conducted which included statistics on the impact of disability on men and women.³⁸ These statistics can be used by an appropriate expert (Chartered Accountant, Economist, or Actuary) to demonstrate likelihoods of reduced employability or market place participation based on specific types of injury.

The 2001 Statistics Canada "PALS" survey (*Participation Activity Limitation Survey*) is more accurate than the 1991 HALS study. It also has statistical information specifically *focusing on children*. The statistic information takes into account the education level of the child prior to injury. PALS itself identifies ten different types of specific disabilities

³⁶ *Crawford, supra* note 2 at para. 293.

³⁷ Gary Principe, "Proving Economic Damages" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2008 Conference)

³⁸ Participation and Activity Limitation Survey (PALS), online: Statistics Canada <<http://www.statcan.gc.ca/cgi-bin/imdb/p2SV.pl?Function=getSurvey&SDDS=3251&lang=en&db=imdb&adm=8&dis=2>>

and deals with them on levels of disability including mild disability, moderate disability, severe and very severe disability.

Obviously this is a specialized area of knowledge which is only being flagged as something that counsel may want to obtain appropriate expert evidence on when dealing with injured children.

3) *Lost Years Claims:*

The "lost years" claims arise where the Plaintiff, as a result of injuries, is not expected to survive to the date of anticipated retirement. It is essentially a claim for loss of future income or loss of future earning capacity. Expert medical and statistical evidence must be led so that the Court may determine the likely life expectancy of the Plaintiff.

In *Toneguzzo Norvell v. Burnaby Hospital*,³⁹ Madam Justice McLachlin of the Supreme Court of Canada found that the Plaintiff 'Jessica' was entitled to an award for the loss of earning capacity, not only for the years she will actually live, but for the years she would have lived had she not been injured at birth. The Court held that a deduction for "*Personal Living Expenses*" must be made from the award for lost earning capacity for the years she will actually live. This is necessary to avoid duplication with the award for costs of future care. Madam Justice McLachlin justified a deduction of 50% for "*Personal*

³⁹ *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114.

Living Expenses" as a result of the fact that the Plaintiff would be cared for from other heads of damages that were being awarded.

The extent of the deduction for *Personal Living Expenses* has varied in different cases - 33%⁴⁰ - 40%⁴¹ - 50%. In the *Semenoff* case the British Columbia Court of Appeal made a deduction of 33% on the basis of conventional figures used from English fatal accidents legislation.

In *Crawford v Penney*, *Mr. Justice Power* was dealing with a claim for an infant Plaintiff Melissa. She was severely brain damaged at birth as a result of medical malpractice. *Mr. Justice Power* considered competing expert evidence from Plaintiff and Defendants as to Melissa's reduced life expectancy. There was a significant divergence of opinion. Statistical information in the "*Eyman study*" was considered and rejected⁴². This was a study of life expectancy of nearly 100,000 disabled persons in the state of California categorized based on different factors.

Mr. Justice Power found that she would have a life span of 54 years (35 years from the date of Trial). He also went on based on her family's strong work ethic and her parents and siblings' intelligence that Melissa would have a loss of future earnings based on statistical information relating to a "community college" graduate. He also found that she

⁴⁰ *Semenoff v. Kokan* (1990), 45 B.C.L.R. (2d) 294.

⁴¹ *Pittman v. Bain* (1994), 112 D.L.R. (4th) 482.

⁴² *Toneguzzo-Norvell*, *supra* note 39.

would have retired at age 60. Therefore there were 6 "lost years" (i.e. 60 years minus 54 projected years of Melissa' life span).

For the lost years he applied a 30% deduction for *Personal Living Expenses* as required by the Supreme Court of Canada in the above noted Toneguzzo case.

4) *Discount for Contingencies*

Discounts for contingencies vary greatly based on the evidence before the Court. For example in the Morrison v. Greig decision *Mr. Justice Glass* found there was no general or specific contingencies to be applied for the Future Cost of Care as the expert *Dr. Empringham* had already taken into account increased mortality risks caused by smoking and by his life having been made shorter from his injuries. However, with respect to future loss of income he applied a 15% discount for contingencies of life.

In that same decision, in the companion action advanced by Derek Gordon, *Mr. Justice Glass* rejected a submission by defence counsel to impose a 20% discount on contingencies with respect to attendant care on the basis that Derek Gordon had a history of rejecting attendant care. The Judge found that as the young Plaintiff required such attendant care, he would always need help and should not be penalized where:

“His brain injuries have taken away his ability to make his way through life on his own.”⁴³

⁴³ *Morrison, supra* note 31 at para.77.

Consequently no discount for contingencies was applied for attendant care. In addition, *Mr. Justice Glass* refused to discount for contingencies Derek's future income loss as he had accepted that the expert evidence of *Mr. Principe* had taken into account contingencies and calculating average incomes, unemployment rates, and part time employment.⁴⁴

In the *Crawford* case *Mr. Justice Power* considered various factors for future loss of income including statistical evidence from *Dr. Pesando* relating to female worker unemployment rates due to "illness, child care, financial set backs, rates of low unemployment and other causes". *Dr. Pesando* had urged a 32% discount for contingencies which was balanced against the family's work ethic which was strong and as well as "employment insurance and other benefits payable to employees while not at work". In the final analysis, the Judge concluded based on the family's background and strong work ethic that he would only apply a 10% discount for contingencies.

Contingencies are too numerous to list which a Court might take into account. By way of example, in the *Personal Injury Damages in Canada*, Cooper Stevenson textbook index, there are approximately half a page of indexed potential contingencies.⁴⁵

B. Future Cost of Care Issues

Introductory Comments:

Undoubtedly the guiding principals are those in the *Arnold* case noted above. The

⁴⁴ *Ibid* at paras. 77 and 78.

⁴⁵ Cooper-Stevenson, Ken; *Personal Injury Damages in Canada* (Scarborough: Carswell, 1996).

“paramount” concern “. . . should be to assure that there will be adequate future care.”

Also, in that same decision, the Supreme Court of Canada said:

“There can be no excuse for foisting on the public the burden of caring for the Plaintiff for supplying her with necessaries of life”.⁴⁶

In addition, Mr. Justice Dickson also said in Lindal v Lindal:

“The amount of the award under these heads of damages (future care expenses and loss of future income) should not be influenced by the depth of the Defendant’s pocket or by sympathy for the position of either party.”⁴⁷

There are as many future care items possible as might be conceived of by creative counsel, occupational therapists, rehab specialists and Life Care Planners. All these experts will, based on competent medical evidence, provide opinions to develop a more probable than not list of future care costs. The costs will include everything from household management, annual housecleaning, transportation costs, medication and supplies, attendant care at various levels, etc. Even specialty treatment such as *Stem Cell treatments* in Portugal have been awarded by the Court⁴⁸ albeit these were past care costs as at the date of Judgment.

1) Attendant Care - Proper Development of the Claim –“The Big Enchillada”

Take the Family Out of the Equation

In each of the Cluster Cases and *Crawford* Plaintiff’s counsel succeeded in proving a need for 24 hour/7 day attendant care which was not dependent upon family members.

⁴⁶ *Teno v. Arnold* [1978], 2 S.C.R. 280 at 333 (S.C.C.).

⁴⁷ *Lindal*, *supra* note 5 at para. 635.

⁴⁸ *Morrison*, *supra* note 31 at paras. 108 to 111.

This claim formed the largest component of the future care claims.

As Nancy Ralph has said in her article "Lessons from Sandhu":

"The issue that has been most overlooked in brain injury cases is whether there is a need for a rehabilitation support worker level of care, and if so, for how many hours and and/or under what circumstances ...

The first thing to do in assessing the amount of future care necessary by a severely injured client is to take the family out of the equation. From the date of the tort Trial for life, the family cannot be conscripted to the service of the injured individual to save the Defendants money by reducing either the amounts of time or money required for the injured person's care. Ask your experts and the person preparing the future care costs report this question: "Without any family member in the picture, what number of hours out of every 24 hours is support needed and at what level?"⁴⁹

Nancy Ralph then goes on to confirm that "the issue is not just that the client is physical capable of doing tasks such as showering, getting dressed and feeding themselves but whether they can learn to do so consistently completing the steps without queuing, prompting, monitoring or supervision". Client behavior, aggression, over-friendliness, shows social inappropriateness and lack of judgment are all factors which will confirm the need for a rehabilitation support worker level of support because of the risk to the client.

The fact that the obligation of attendant care shouldn't be foisted on family members is confirmed in Crawford v. Penney by Mr. Justice Power:

⁴⁹ Nancy Ralph, "Lessons from Sandhu" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2006) at page 3.

"It would be unreasonable to impose obligations of this nature on her parents or siblings. While I have no doubt whatsoever that her family will continue to participate in Melissa's care and provide companionship to her, Melissa, is nevertheless entitled to 24 hour care/supervision from others."⁵⁰

Mr. Justice Power then went on to consider the various levels of care and rates charged. He considered the evidence of physiatrist, Dr. Berbrayer, who expressed the opinion that an RN would be necessary during the daytime, but, that at night a registered practical nurse would be required. The Defendants were pushing to have the parents responsible for 8 hours of care per day with 8 hours to be performed by a personal service worker with the remaining 8 hours by a registered practical nurse.

With respect to this suggestion, *Mr. Justice Power* said:

"In my view, this is not good enough, first of all, as aforesaid there is no legal basis on which to impose this burden on Melissa's parents, even though they have and probably will continue to provide whatever care and comfort they are able to give. Secondly, given Melissa's physical problems, the caregiver must, at least, possess the qualifications of a registered practical nurse."⁵¹

While there is no calculation of the present value of 24/7 attendant care at \$29.50/hour in the decision the number was undoubtedly the most significant number in the cost of care as it was in *Sandhu, Morrison* and *Marcoccia*.

⁵⁰ *Crawford, supra* note 2 at para. 304.

⁵¹ *Crawford, supra* note 2 at para. 304.

As has been indicated in several cases, counsel must establish:

- a) the need for/duration of attendant care required; and
- b) the quality or level of attendant care required.

(a) Proving the Need for Attendant Care

As stated all three of the Cluster Cases and in Crawford v. Penney counsel successfully satisfied the Court of the need for 24 hour/7 attend ant care at one level or another taking the family out of the equation.

The test as to what will qualify the Plaintiff's entitlement to 24/7 is, of course, dependent on the evidence. In Morrison v. Greig Mr. Justice Glass did not accept a defense counsel's submission that Ryan Morrison (a quadriplegic) be dependent on a call service with a one-half hour response time. In rejecting that defence he said as follows:

"If this Plaintiff were to be living on his own and did not have 24 hour a day attendant care, he would be at risk of not having an emergency addressed quickly. For example, if there were a fire and it was going to take a personal care worker half an hour to come to his residence, the Plaintiff might die in the meantime. This person is not one who only needs a nanny to pick up after him. He needs someone who can be there right away and someone who understands the limitation of a spinal cord injury person so that he can be assisted properly."⁵²

Other cases can be more obvious. Often times the lack of judgment of the Plaintiff or behavioural problems will be the trigger that will qualify them for 24/7 attendant care.

⁵² *Morrison, supra* note 31 at para. 125.

In the Gordon v. Greig (2007) decision, evidence confirmed that Derek Gordon had a severe acquired brain injury, bladder and bowel control problems, a lack of sense of smell, he had poor judgment, made radically inappropriate comments, was depressed and had difficulties with concentration and memory. He could not go through a night without wetting himself; he was extremely upset by these events. Of these facts he was found to be entitled to 24/7 Attendant Care for the rest of his life. Derek was reluctant to accept help which gave Defense Counsel the opportunity to move for substantially reduced Attendant Care. Roger Oatley called an Occupational Therapist, a Neuro-Psychologist and a Clinical Neuro-Psychologist, all of whom confirmed his need for attendant care on a 24/7 basis.

Mr. Justice Glass simply accepted the evidence of the Plaintiff as to not only the need for 24/7 care but also the quality and caliber of full time assistance. The total future care award including attendant care costs was calculated by Gary Principe. It was allowed in the sum of **\$8,646,900.**⁵³

In Crawford v. Penney Melissa was severely dependent on her parents. Her Mother left work to care for her. Melissa functioned at a primary level. She could add and subtract single digit numbers to 20 with a 90% accuracy rate. She communicated by kicking her left foot or by touching a small target. She suffered a series of respiratory ailments on a continuous basis which led her to be hospitalized from time to time with pneumonia. As noted above, *Mr Justice Power* rejected imposing the care obligation on the family.

⁵³ *Morrison, supra* note 31 at paras. 52 to 60.

(b) Quality of Attendant Care

In Crawford, Justice Power accepted the evidence of the physiatrist. In responding to the defense suggestions that the parents could shoulder 8 hours of the responsibility per day and a further 8 hours by a non-skilled personal service worker and the remaining 8 hours by a registered practical nurse, Mr. Justice Power rejected defense counsel's view of quality of care submissions. He favored that recommended by Melissa's physiatrist and found Melissa entitled a registered nurse during the daytime; and at night - a registered practical nurse ("more than unskilled minimum wage persons").⁵⁴

In Morrison v Greig Mr. Justice Glass found that Ryan Morrison needed "more than just a person without skills". Mr. Justice Glass distinguished the case from Dube v. Penlon (1992)⁵⁵ and Desbiens v. Mordini (2004)⁵⁶. In those cases the Court permitted minimum wage and quality unskilled attendant care workers to provide overnight Attendant Care.

Future Care Costs including attendant care for Ryan Morrison was allowed at **\$8,880,000.00**

Nancy Ralph describes the dispute which the Jury in Sandhu had to resolve initially with respect to Harvinder's entitlement to 24/7 attendant care and then with respect to the various levels of quality of care as follows:

⁵⁴ *Crawford*, supra note 2 at para. 304.

⁵⁵ *Dube v. Penlon Ltd.*, [1992] O.J. No. 4068 (Gen. Div.).

⁵⁶ *Desbien v. Mordini*, [2003] O.J. No. 3369 (S.C.J.).

“There was a substantial dispute between the parties as to the amount and level of care Harvinder would need over his lifetime. The Plaintiff’s position was that he would always need 24 hour a day /7 days a week care. There were a number of different levels of care: basic “companion/sitter” that according to the evidence would range from \$10 - \$16/hour if hired directly; “attendant” that would range from \$16-\$24/hour; and “rehabilitation support worker/child and youth worker/job coach” that ranged from \$45-\$53/hour. Given the devastating injury, the evidence supported care for a significant part of the day at the highest level of care.

There was also an issue over whether it was appropriate to hire the workers through agencies or whether it was a saving if the family were to hire the workers directly. There were days of evidence about hourly rates and what type of service was available at the different rates. Evidence was led that if workers were hired directly then there are issues of taxes and commissions that had t be taken into account to gross up the basic hourly rates to a “real cost” to the injured party and family”.⁵⁷

In Sandhu it appears the Jury accepted the evidence that if Harvinder was left along overnight, he would be defenseless in the case of an emergency and would not have adequate judgment to safely get out or letting people into his home who might be undesirable. This is the same reasoning used by *Mr Justice Glass* in the Ryan Morrison v. Greig case.⁵⁸

Examples of the Models and Items Considered in Attendant and Future Costs of Care Claims:

Although approaches differ in terms of developing attendant care and future costs of care, *Mr. Justice Glass*, dealing with *Morrison* claim, examined different models for the attendant care and future cost of care presented by both Plaintiffs and Defendants. Plaintiff’s counsel presented 8 heads of future care as follows:

⁵⁷ *Ralph*, *supra* note 49 at pages 2 and 3.

⁵⁸ *Morrison*, *supra* note 31 at para. 125.

- (i) *activities of daily living;*
- (ii) *mobility considerations for the wheelchair, repairs, a walker and leg braces;*
- (iii) *transportation with the Plaintiffs own vehicle with modifications;*
- (iv) *rehabilitation with various treatments such as physiotherapy, chiropractor and massage therapy;*
- (v) *health maintenance and supplies;*
- (vi) *medications and supplies;*
- (vii) *housing recommendations as given by Jeff Baum;*
- (viii) *future considerations such as a power wheelchair to avoid bursitis and wear of the shoulders, the possible need for an overhead lift if Mr. Morrison is unable to slide on a board from his bed to a wheelchair, and the need for attendant care if he is ill or bedridden.*⁵⁹

The Plaintiff's expert then divided Ryan Morrison's life into three time periods. First period from the Trial until he moved out from his parent's home in 2008, secondly there was a period of time he moves out of home until 20 years after his injuries (May, 2023). Finally, the period 20 years after sustaining his injuries to the end of his life. This model assisted in developing a future care costs model and took into account attendant care for the following:

- (i) *dressings;*
- (ii) *undressing;*
- (iii) *putting on and removing shoes with clothing changes at times of incontinence;*
- (iv) *long leg braces being put on and taken off as well as being adjusted;*
- (v) *transfers;*

⁵⁹ *Ibid* at para.131.

- (vi) *getting into and out of bed for naps;*
- (vii) *bowel treatments on and off the commode;*
- (viii) *incontinent episodes;*
- (ix) *supervision during bowel treatments;*
- (x) *supervision during showering;*
- (xi) *supervision for extra showering during summer months;*
- (xii) *overnight supervision during weekdays and weekends;*
- (xiii) *bathroom cleaning after use;*
- (xiv) *bedroom cleaning;*
- (xv) *meals, snacks, transporting hot food or liquids or heavy food items;*
- (xvi) *personal laundry;*
- (xvii) *cleaning Mr. Morrison after incontinence experiences, catheterization and retrieving supplies;*
- (xviii) *cleaning equipment with respect to bowel routine;*
- (xix) *work on the Giger MD (an aerobic exercise device);*
- (xx) *walking with the parallel bars;*
- (xxi) *electrodes applied and removed for the cycle;*
- (xxii) *Pneu-weight walker which requires 4 people to use properly;*
- (xxiii) *Checking skin care for pressure sores and application of creams;*
- (xxiv) *Ordering and monitoring supplies;*
- (xxv) *Ensuring that equipment is kept in good working order and cleaned.⁶⁰*

By contrast, *Mr. Justice Glass* rejected the defense model which Defendant's expert broke Ryan Morrison's into 9 separate life stages and four career stages. While they were rejected, the modeling necessary to develop future care claims is interesting and is as follows:

⁶⁰ *Morrison, supra* note 31 at para. 133.

The family model adopted by Ms. Tasker is broken into 9 life stages and 4 career stages in a person's life. They are the following:

- (i) living independently ; (as in moving form his parents' residence);*
- (ii) becoming independent;*
- (iii) marriage;*
- (iv) child bearing family stage;*
- (v) family with pre-school children;*
- (vi) family with school-aged children;*
- (vii) family as the children move out;*
- (viii) the empty nest stage;*
- (ix) retirement to death.”⁶¹*

The career stages are the following:

- (i) exploration i.e. looking for career opportunities;*
- (ii) the establishment phase-getting established and then skill building;*
- (iii) the maintenance phase of the career;*
- (iv) disengagement or retirement phase.”⁶²*

2) Adaptable Homes, Renovations, Acquisition and Moving Costs

As mentioned below accident benefits (SAB) probably are the best first line for securing necessary renovation improvements or if appropriate under the Regulation

403/96. Section 15.5 (5) provides:

"The rehabilitation benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the

⁶¹ Morrison, *supra* note 31 at 140 and 141.

⁶² *Ibid.*

insured as a result of the accident... for, (i) home modifications . . . including . . . the purchase of a new home if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home."⁶³

As can be seen in the tort action in *Morrison v. Greig* claim, Jim Vigmond advanced a claim for a retrofitting or purchase of a new home in accordance with the recommendations of *Jeff Baum of Adapt-Able Design Group* and was awarded the sum of \$374,800 as a reasonable allowance for moving costs based on three moves per lifetime. In addition, it appears he was given a Judgment for the purchase of a new residence that was appropriately adaptable.⁶⁴

In *Crawford v. Penney* *Mr. Justice Power* considered the possibility of purchasing a home for Melissa in accordance with the recommendations of Adapt-Tech. The estimate was in the \$360,000 range.

In considering the claim *Mr. Justice Power* confirmed:

"A strong pre-disposition for home rather than institutional care for a severely disabled Plaintiff".⁶⁵

Although the possible move and building her a home in Kingston was considered, *Mr. Justice Power* felt that the Defendant should not have to bear the move to Kingston and allowed not to have to bear the expense of the move to Kingston and allowed the Plaintiffs the cost of extensive renovations in the amount of \$175,000.⁶⁶

⁶³ O. Reg. 403/96, s. 15.5(5).

⁶⁴ *Morrison, supra* note 31 at paras. 150 to 169.

⁶⁵ *Crawford, supra* note 2 at para. 308.

⁶⁶ *Ibid.*

3) Housekeeping and Handyman Claims

The statutory accident benefits provide \$100 per week up to a maximum of 104 weeks for non-catastrophic injuries. The housekeeping expense is not limited at all with respect to catastrophic injuries.

Above and beyond these benefits or in cases where there is no motor vehicle involved, housekeeping and home maintenance including handyman claims are appropriately claimed. In the *Morrison* case Derek Gordon received compensation for heavy cleaning and handyman assistance for home repair.⁶⁷

With respect to Ryan Morrison's claim many of the cleaning requirements were blended into the attendant care costs which attendant care items are listed.⁶⁸

4) Creative or Unusual Expenses

In the *Morrison v. Greig* decision the Court allowed a claim of \$74,913.78 for special damages for stem cell surgery that this young paraplegic took in Portugal as well as the costs related to his aggressive rehabilitation in Detroit, Michigan. Interestingly the surgery did produce some positive improvements changing Ryan Morrison from a complete paraplegic to an incomplete paraplegic who could crawl.

⁶⁷ *Morrison*, *supra* note 31 at para. 51.

⁶⁸ *Ibid* at para. 133.

5) Discount Rate Adjustment Under R.53.09

A discount rate has been defined as being “the difference between the interest rate that can be earned on a lump sum invested and the rate of inflation”. The discount rate reflects the fact that interest will typically earn money faster than it is devalued by inflation.

In the *Morrison/Gordon v Greig* decision of *Mr. Justice Glass*, he accepted evidence given by the expert produced by Messrs. Oatley, Vigmond - *Dr. Coyte* who is an expert in the field of health economics. *Mr. Justice Glass* accepted his expert testimony that the projected cost of health care in the future would rise at least 30% faster than the general rate of inflation.⁶⁹ Accordingly *Mr. Justice Glass* varied the normal discount rates under Rule 53.09 so that they were lowered in the first 15 years to 0% and 1.5% for the years thereafter.⁷⁰

Altering discount rates may also be appropriate where dealing with structured awards where the interest rates are higher than structure inflation rates – which if included in the structure are generally at the rate of 2% which is lower than the rates prescribed in R 53.09.

⁶⁹ *Morrison, supra* note 31 at para. 145.

⁷⁰ *Ibid* at paras. 170 to 177.

C. Post Trial Damages Issues

1) Investment and Management Fees Related to Management of Settlement Funds of a Person Under Disability

Two leading cases on investment and management fees are *Sandhu* and *Marcoccia*.⁷¹ In *Sandhu*, **\$1,795,800** were awarded for future guardianship and legal costs to deal with the investment management issues rising with a \$12,936,145 award for generals, future loss of income and future care. Likewise, in *Marcoccia* **\$1,265,816** were awarded in guardian, legal and management fees on the \$15,654,304 awarded under all heads of damage.

In *Morrison v. Greig* Mr. Justice Glass took a much more simplistic approach and awarded 4% of the damages as a management fee for Ryan Morrison⁷² and a 5% management fee for Derek Gordon⁷³.

2) Guardianship Order, Management Fees and Future Legal Costs

Many catastrophic injury victims require the assistance of Guardian as to Property and/or Personal Care under the *Substitute Decisions Act*. The obtaining of a Guardianship Order will involve consultation with the Public Guardian and Trustee and may require input from the Children's Lawyer. The completion of Management Plans and Guardianship Plans will also require careful consideration of who should be appointed, what investment portfolios will be serve the interests of the Plaintiff and what review cycle is needed in the Order for the passing of Guardian's Accounts. In the

⁷¹ *Marcoccia*, [2007] O.J. No.1333; 156 A.C.W.S. (3d) 831 (S.C.)

⁷² *Morrison*, *supra* note 31 at para. 178.

⁷³ *Ibid* at page 32.

larger cases expert Economic, Actuarial and Medical opinions must be obtained to complete these Plans for review by the PGT and the Court for infant approval or Trial.

In the largest cases, it is probable that a Trust Company or professional investment manager will have to be appointed as a Co-guardian of the property. Costs of such company are quite high and obviously formed part of the Judgment in the above noted cases Sandhu and Marcoccia. In Marcoccia an Application was made under the *Substitute Decisions Act* to have a Management Plan approved and to set the framework for the Financial Management of the Estate Assets that were formed by the Jury award. Estate lawyer (Ms. O'Sullivan) provided expert evidence as to the lawyers' time that would be required to obtain approval of the Application. Her estimate for the preliminary Application approval was \$18,020.⁷⁴

The tariffs under the *Substitute Decisions Act* was reviewed but an increase in the legal fees was ordered.

In addition, Ms. O'Sullivan gave evidence that was accepted as to the need for ongoing legal advice on future passing of accounts and orders for direction from time to time relating to normal life events such as marriage, separation, family causation, litigation, etc. She estimated and it was accepted that there would be a budget of \$19,610 for every 10 years of life.

In addition to those legal fees Robert Marcoccia had major anger management

⁷⁴ *Marcoccia*, *supra* note 71 at paras. 16 and 17.

behavioural issues as a result of his injuries. A budget of 10 hours per year was built for legal fees arising out of behavioural issues for a total of \$5,565 per year for life.⁷⁵

A further budget of 10 hours every five years was created to deal with negotiations with the Public Guardian and Trustee in anticipation of ongoing needs of the infant.

In that case and in *Sandhu* a combination of corporate Co-guardian and a personal relative Co-guardian was preferred to protect the management of the money while accommodating human needs that a family member might be more sensitive to.

The Court must also wrestle with the appropriate blend of investments. The management fees are less for structured annuity payments. They attract a small management fee as opposed to fees generally based on income and payout. It must also be created for fees payable to the Public Guardian; clerk costs; preparation of tax returns; corporate and relative management fees which are subject to GST (or the new blended tax).

Of course, issues relating to the appropriate types of investments are beyond the scope of this paper and will be subject to a great deal of expert evidence and assessment by the Court prior to approval of any guardianship investment scheme.

The complexity of these issues is demonstrated by the Application for a Guardianship Order before *Moore J.* in *Marcoccia* in April of 07 which resulted in a 82 page decision.

⁷⁵ *Marcoccia*, *supra* note 71 at paras. 21 and 22.

One of the major problems that arises in claims where much less money is recovered (by reason of policy limits or otherwise) is that the corporate costs of a corporate Guardian are prohibitive in recoveries in the range of a few million dollars or less.

The appointment of a relative as the Guardian of Property and Person (if necessary) is not without risk. There have been several cases involving the mismanagement of funds thus making the involvement of the Public Guardian and Trustee helpful as they are very stringent about the terms they negotiate in endorsing the appointment of a relative as a Guardian of Property.

It is important to remember that under **Rule 7.09** counsel must request and demonstrate to the Court that a Payment into Court is not appropriate or practical. Obviously the Payment into Court will not allow for payments to manage ongoing future care costs or other expenses of life.

In addition, structured settlements may or may not be indexed. As Nancy Ralph points out in her article, the discount rates prescribed by **Rule 53.09** do not apply to a structure. She says as follows:

“Once you are at the stage of considering how much of a Judgment to put into a structure, the question is different. When the Court is considering the best interests of the Plaintiff and how to balance the safety and the certainty of a structure against the fact that in the current market, the structure cannot provide a product which keeps pace with the inflation predicted by Rule 53.09”.⁷⁶

⁷⁶ Ralph, *supra* note 49 at page 7.

Whether counsel prefers a simple percentage of Judgment approach to management and guardianship expenses or a more complex approach to their valuation, it is clear that in larger Judgments, much more is at stake for the Plaintiff in terms of these future expenses

3) *Henson Trusts*

Henson Trusts may be used as a technique to deal with catastrophic level awards where the available policy limits will not satisfy the future costs of care and other needs of a Plaintiff. The purpose of this discretionary Trust is to create a trust which will allow the Plaintiff's guardian, or the Plaintiff him or herself to apply for various funding available from Federal or Provincial governments in the future such as ODSP. The Trust legitimately creates a situation where the person has no assets or income. The income and assets are owned in the Trust. They are distributed in the discretion of the Trustees for the benefit of the injured child as and when needed. Henson Trusts have been recognized in the Courts in the Henson decision. A sample Henson Trust document is attached as an Appendix (Appendix "B").

The Public Guardian and Trustee has reviewed a combination of Henson Trusts utilized in a Guardianship Order set up under the *Substitute Decisions Act*.

The Public Guardian and Trustee has generally permitted the combined use of Guardianship Orders and Henson Trusts so long as the Trustees in the Henson Trust and the Guardians appointed pursuant to the Court's Guardianship Order are one and

the same. The reasoning according to discussions had with some of the representatives of the Public Guardian and Trustee is that they feel that through the *Substitute Decisions Act* they have some control over the Trustee's in the Henson Trust environment should the Trustee and guardian be one and the same.

The accessing of public funds for devices and other funds which may be available under ODSP or otherwise in the future could be important in the long run where limits are deficient.

There are however concerns for counsel and for the injured victim. Firstly, it is generally not cost efficient to use an institutional trustee where there are already inadequate recovery sources. Consequently relatives or friends of the victim are often considered both as guardians under the *Substitute Decisions Act* and as Trustees under the Henson Trust. I believe that each time this is done there is some risk that at a later date counsel may be exposed to the risk of a claim of negligence unless diligence in selecting the trustee/guardian is exercised. It is impossible to know what will satisfy the Courts under these circumstances.

In addition, while the purpose of the Henson Trust is generally to facilitate the possibility of participation in asset and income sensitive funding programs, it is impossible to know the true value to the Plaintiff of setting up the Henson Trust vs. the risks associated with the third party individual Trustee. These risks are somewhat mitigated if the third party trustee is governed by the *Substitute Decisions Act* remedies as Guardian.

D. Statutory Accident Benefits Claims (SABs):

There are still many firms who do not wish to become involved in statutory accident benefits claims. Attached is a summary provided to clients of the statutory accident benefits claims available since the 1st of October, 2003 (Appendix "C").

Not only are these benefits crucial to Plaintiff's immediate benefit, they can also be used to reduce the shortfall created in damage awards created by limited liability policy limits in the hands of Third Parties.

As indicated above, we have had success obtaining houses and housing renovations under the statutory accident benefit noted above on many occasions. Increasing burn rates on statutory accidents by ensuring that the Case Manager or law firm monitors the client to ensure the client is using the benefits available and can facilitate and maximize a 'cashout' of the statutory accident benefits at some point.

Catastrophic cases attract up to \$1,000,000 in medical and rehabilitation benefits and an additional \$1,000,000 in attendance care benefits.. In addition, there are several benefits that are not limited by upper limits in catastrophic cases. These include housekeeping, visitor expenses, Income Replacement Benefits (which do ramp down after age 65), non-earner benefits, and caregiver benefits.

In addition, under the medical and rehabilitation expenses very creative solutions can be had under S.15(2) of the SAB Regulation. These have been creatively and exhaustively described in *Ted Master's* paper entitled *SAB – Section 15(2): Basket Clause or Horn of Plenty? – OTLA Fall Conference 2007.*⁷⁷

In this paper Ted Masters describes in a fairly exhaustive manner how rehabilitation benefits under this section can be used to reduce or eliminate the effects of any disability and re-integrate a Plaintiff into a family oriented society or the labor market.

Automobiles, home modifications, transportation, golf carts, computers, software training, etc. are all available through the creative use of this section.

Of course we are all aware of the deductibility of the statutory accident benefits from the tort award under s.267(1)(a) of the *Insurance Act, R.S.O. 1990*, however, where there are third party liability limits.

⁷⁷ Ted Masters, "SABS s 15 - Basket Clause or Horn of Plenty?" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2007).

APPENDIX D



Advocacy Litigation
Mediation Arbitration

The Dispute Resolution Law Firm

Injured Child Assessment Form

979 Wellington Street West
Ottawa, Ontario
Canada K1Y 2X7
Tel: 613-241-3400
Fax: 613-241-8555

*The purpose of this assessment is to examine your child's background, educational performance, social activities and other important achievements up until the date of the accident.
Examining these factors can assist in determining what would have happened to the child, had the accident not occurred.*

CLIENT CONTACT INFORMATION

INTERNAL

Date: _____ Interviewer: _____
How did the client learn of us: _____
Retainer Arrangement: _____

CLIENT CONTACT INFORMATION

Name: _____
Guardian information: _____

Address: _____

Telephone: _____
Home: _____ Mom Cell: _____ Dad cell: _____
Other: _____ Mom work: _____ Dad work: _____

Email: _____

Date of Birth: _____ Place of Birth: _____

Date Came to Canada: _____ S.I.N. (if applicable): _____

Health Card: _____

Height: _____ Weight: _____

PART A: HOME AND DAILY FAMILY LIFE:

Instructions to parents and guardians: this part of the assessment will discuss what your child was able to do at home and with the family prior to and after the accident. We are interested in determining how much assistance the child required prior to the accident and how this has changed.

PRE-ACCIDENT:		
<p>What type of house do you currently reside in?</p> <p><input type="checkbox"/> Two-story house</p> <p><input type="checkbox"/> Three-story house</p> <p><input type="checkbox"/> Three-story house with basement on main level</p> <p><input type="checkbox"/> Bungalow</p> <p><input type="checkbox"/> Apartment</p> <p><input type="checkbox"/> Mobile home</p> <p>How long have you resided there? _____ (years or months)</p> <p>Prior to the accident, was the child able to navigate the house without incident _____ (y/n)</p> <p>If no, explain:</p>		
<p>Does he/she share a bedroom with anyone else?</p> <p>Whom?</p>		
Was the child able to dress himself or herself?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he do their own laundry?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he shower independently?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he do their own hair? (shampooing, drying, curling etc.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she do her own make-up? (if applicable)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Can you describe the chores the child did <i>inside</i> the house?		

Did she/he sweep the floors?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he dust or wax the furniture?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/>
Did she/he vacuum?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he make the bed and maintain her own room?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he change the linens?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he take the garbage out?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he cook her own meals?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he do dishes?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he empty the dishwasher?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did the child do any work <i>outside</i> of the house?		
Did she/he cut the lawn?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he do any gardening?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he rake the leaves?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he shovel the snow?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Did she/he assist with purchasing groceries?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Any Further Comments?

POST-ACCIDENT:

Is the child able to dress himself or herself?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he do their own laundry?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he shower independently?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he do their own hair? (shampooing, drying, curling etc.)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she do her own make-up? (if applicable)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he sweep the floors?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he dust or wax the furniture?	<input type="checkbox"/> Yes	<input type="checkbox"/> No <input type="checkbox"/>	<input type="checkbox"/> With Aid
Does she/he vacuum?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he make the bed and maintain her own room?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he change the linens?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he take the garbage out?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he cut the lawn?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he do any gardening?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he rake the leaves?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he shovel the snow?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Did she/he assist with purchasing groceries?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid

Does she/he cook her own meals?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he do dishes?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid
Does she/he empty the dishwasher?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> With Aid

Any Further Comments?

PART B: SCHOOLING AND EDUCATIONAL ADJUSTMENTS:

Instructions to parents and guardians: this part of the assessment will discuss the child's academic and extra-curricular performance.

School: _____
 Current grade : _____
 Individual education plan? _____
 Current teacher: _____

<i>PRE-ACCIDENT:</i>
Do you have copies of the child's reports cards? Please provide them
What subjects does he/she excel at?
What subjects does he/she struggle with?

--

<p>Does he/she have an IEP? For what subjects? For how long has the IEP been in place?</p>
--

<p>Does the child participate in any extra-curricular activities at school?</p>	<p>Contact information of coach/supervisor:</p>
---	---

<p>Which activities? How often?</p>

--

Who are the child's closest friends at school?	Contact information:
--	----------------------

<i>POST-ACCIDENT:</i> Has the child's schooling been modified as a result of the accident? Describe:
Has the child's IEP been modified as a result of the accident?

Has the child withdrawn from any recreational activities as a result of the accident?

Has the child lost school friends as a result of the accident?
Why?

PART C: SOCIAL AND RECREATIONAL ACTIVITIES:

Instructions to parents and guardians: this part of the assessment examines what activities your child was participating in prior to the accident and if the child can still participate in the activity without assistance. Please check all relevant activities.

ACTIVITY	PRE-ACCIDENT	POST-ACC. INDEPENDENT	POST-ACC. WITH AID	NOT ABLE PERFORM
Exercise				
Exercise	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Martial Arts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Running	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Swimming	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Track and Field	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Camps (day or Overnight)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Photography	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Friends, Family and Social Activities:				
Arts and Crafts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Movies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Shopping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vacations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Computers (gaming etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pet care	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Summer Activities				
Camping	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Fishing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sailing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Basketball	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Football	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Hiking	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inline Skating	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tennis/Badminton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rock Climbing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Skateboarding	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Soccer	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Volleyball	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Winter Activities				
Hockey	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Skating	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Skiing and/or snowboarding	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Snowshoeing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Tobogganing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Music & Dance				

Dance (tap, jazz, etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Music (piano, singing etc.)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Theatre (acting)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Organized Activities				
Girl guides, brownies, scouts	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Church youth groups	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
YMCA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Volunteer positions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Part-time work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Gymnastics	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

PART D: MEDICAL AND NECESSARY ASSISTANCE:

This part of the assessment informs us of any prior and post accident health conditions. It is important to keep us informed of all relevant health information.

PRE-ACCIDENT

(a) Health

How would you describe your child's health generally?

Does the child have any pre-accident medical conditions?

List all treating practitioners.

Required to attend for regular medical appointments?

--

Particulars of appointments:

Is the child taking any medication? If so, what are the dosages of these medications?

POST-ACCIDENT:

Have any pre-existing medical conditions been exacerbated by the accident?
--

In what way?

List any medications prescribed as a result of the accident.

Who ensures that the medications are being consumed as necessary? (Is an outside caregiver required?)

Are there any prosthetics required?

Orthotics

Treating practitioners

Medical, primary care

Medical, hospital personnel

Psychological counseling

Dental

Therapists
Case Manager

(b) Nutrition

Is the child able to eat on his/her own?
If not, can he/she eat with assistance from someone?
Is a feeding tube required?

Have arrangements been made for the care of the feeding tube?
Is a special diet required? Costs of the diet?
Can the child eat solid food?

c) Aids and Equipment

Does the child require any of the follows aids?

Wheelchair	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Ramps	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Lift	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Walker	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure

Cane	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Crutches	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Helmet	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Transfer bench	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Raised toilet seat	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure
Bath benches	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> unsure

Comments:

APPENDIX E

LIVING MINOR PLAINTIFFS
SAMPLE CASES
THE CAP, JURY AWARDS, AND APPEAL DAMAGES

CASE	AGE & FACTS	TRIAL AWARD	APPEAL AWARD (IF APPLICABLE)
<i>Bartosek (litigation guardian of) v. Turret Realities Inc (2001)</i>	6 when struck by MVA while riding his bicycle	\$275,598 non- pecuniary (cap) \$750,000 for future income loss \$264,000 FLA mother \$140,800 FLA sister \$97,360 FLA brother	
<i>Krangle (Guardian ad litem of) v. Brisco (2002)</i>	Born with down syndrome. Action by parents against Doctor for the cost of raising their son and the failure of to test for medical conditions	Judge awarded: No future care costs. Cost of group home is covered by government. \$80,000.00 to protect against possibility of social safety net not being available to child in the future	
<i>Crawford v Penney 2003 – Trial 2004 – COA</i>	Medical malpractice suit arising out of complications from Plaintiff's birth.	Judge awarded: \$10,000,000.00 in damages. The maximum was awarded for non- pecuniary damages was	The appellants appealed the judgment and asked that it be set aside and a new trial ordered. COA dismissed the appeal.

		<p>\$280,000.00</p> <p>Parents are each awarded \$80,000 under s. 61 of the Family Law Act (Ontario), and \$375,000 for future care.</p> <p>Mother is awarded \$102,700 for lost income in looking after Melissa. Finally, Melissa is awarded \$1,409,580 for loss of future earnings.</p>	
<i>Spehar v. Beazley</i> 2004- C.A.	16 at the time of the MVA	<p>Judge awarded:</p> <p>\$280,000.00 for non-pec damages award, the cap at the time</p> <p>\$3,665,825 for future care</p>	Appeal on award of future care dismissed by the B.C. Court of Appeal
<i>Lee v. Dawson</i> 2003 – Trial 2006 – COA	<p>15 at the time of the MVA - he was a passenger in a motor vehicle when a transport truck spilled lumber on the roadway and into the path of the Lee vehicle.</p> <p>Mr. Lee sustained a traumatic brain injury and significant neurological, cognitive and</p>	<p>Jury Award:</p> <p>Total of \$3,031,176.89</p> <p>\$2,000,000 non-pec, Reduced to cap limits of \$294,600)</p> <p>\$782,000 for future loss of earning</p>	*Charter challenge. British Columbia Coalition of People with Disabilities was granted leave to intervene at SCC but the cap upheld.

	psychological injuries, as well as permanent facial scarring, as a result of the accident.		
<i>Yeung (Guardian ad Litem of) v. Au (2004)</i>	Age 16. Injured while riding as a passenger in a MV. Ms. Yeung suffered significant injuries in the accident, including a permanent brain injury.	\$5,800,000 \$3,990,000 for future care costs \$1,000,000 for loss of future earning capacity & marriageability	Note: <i>Yeung (Guardian ad Litem of) v. Au [2007] B.C.J. No. 230</i> decision is a dispute over the amounts allocated to investment management fees.
<i>Sandhu v. Wellington (2006)</i>	Age 2 at time of fall out of window	Jury Award: \$12,936,143 in damages (not including guardianship and management costs) \$10,942,000 for future care \$311,000 for non-pecuniary damages \$100,000 to each of parents and brother for FLA \$1,166,283 for Plaintiff's loss of future income	
<i>Morrison and Gordon v. Greig, (2007)</i>	Age 22 at time of the accident	Judge awarded: Total damages award: Gordon - \$11,369,525	

		<p>\$8,646,900 for future care & attendant care</p> <p>Morrison - \$12,441,198</p> <p>\$8,800,000 for future care and attendant care</p>	
<p><i>Marcoccia v. Gill (2007)</i></p>	<p>20 at the time of the loss</p>	<p>Jury awarded: \$15,650,182 in damages (some contrib.)</p> <p>\$312,200 non-pecuniary damages</p> <p>\$1,384,918 for future income loss</p> <p>\$13,953,064 for future care</p>	

APPENDIX F

DECEASED MINOR PLAINTIFFS
SAMPLE OF CASES

CASE	AGE OF FLA members (if disclosed)	AWARD
<i>Courtmanche v. McElwain et al. [1963] 1 O.R. 472 (C.A.)</i>	Age of parents not disclosed	Age 7. Evidence that the boy was intelligent, progressing well in school and in good health. Trial Award: <ul style="list-style-type: none"> o \$1,500 (upheld on appeal)
<i>Mason v. Peters et al.(1982), 39 O.R. (2d), 27 (C.A.).</i>	Mother: age 31 when child died	Darren, Age 11. Darren and his sister, Kelly, who was 10 years old as of the date of Darren's death, were raised by their mother. Mrs. Mason was a paraplegic. Jury Award: <ul style="list-style-type: none"> o \$45,000 to mother, Mrs. Mason o \$5,000 to sister, Kelly The Court of Appeal upheld the awards.
<i>Gervais v. Richard (1984), 48 O.R. (2d) (Ont. H.C.J.)</i>	Mother and father: age not disclosed Siblings: Rick: 20 Sue: 19 Doris(plaintiff): 16 Denise: 14 Robert: 12 Carol Ann: 11	Age 16, daughter. Doris was killed in a single vehicle motor vehicle collision. Doris assisted her two younger siblings with homework and also had a strong relationship with her older sister. Trial Award: <ul style="list-style-type: none"> o \$6,000 to two younger siblings o \$4,500 to older sibling o \$12,000 to mother o \$10,000 to father
<i>Nightengale v. Mazerall (1991),</i>	Mother: 32 years-old Father: 33 years-old at	Two deceased: ages 9 months and 6 years.

<p>87 D.L.R. (4th) 158 (N.B.C.O.A.)</p>	<p>time of trial (Nov. 1991)</p> <p>At time of accident (Nov. 1998), mother was 29 and father was 30)</p>	<p>Expert psychologist testified to stages of grief.</p> <p>Award for 6 year old:</p> <ul style="list-style-type: none"> ○ \$15,000 for loss of companionship ○ \$15,000 for loss of grief <p>Award for 9 mo old:</p> <ul style="list-style-type: none"> ○ \$15,000 for loss of companionship ○ \$20,000 for loss of grief <p>*Amounts to be divided equally between each parent</p>
<p>Wilson v. Martinello (1993), 47 A.C.W.S. (3d) 69 (Ont Gen. Div.)</p>		<p>Age 15, daughter.</p> <p>Award:</p> <ul style="list-style-type: none"> ○ \$25,000 to one parent
<p>Lian v. Money (1994), 93 B.C.L.R. (2d) 16 (S.C.)</p>		<p>Age 20, daughter.</p> <p>Award:</p> <ul style="list-style-type: none"> ○ \$5,000 to mother
<p>Macartney v. Islic (1996), 334 C.C.L.I. (2d) 119 (Ont Gen. Div.)</p>		<p>Age 19, son.</p> <p>Award:</p> <ul style="list-style-type: none"> ○ \$25,000 to mother ○ \$15,000 to father
<p>Augustus v. Gosset [1996] 3 S.C.R. 268</p>		<p>Teenager killed by police officer in Québec. Mother sought damages for <i>solatium dolaris</i> under the <i>Civil Code of Lower Canada</i></p>
<p>Guimond v. Guimond Estate (1996) 183 N.B.R. (3d) 125 (N.B.C.O.A.)</p>		<p>Barbara Ann Guimond and her daughter Jessica Guimond were killed in a motor vehicle accident. Barbara was found fully liable.</p> <p>Award, combined for loss of Barbara and Jessica:</p> <ul style="list-style-type: none"> ○ \$22,677 for Jessica's father ○ \$39,404.08 for Jessica's sister

<p><i>Rintoul v. Lind Estate (1997), 32 O.R. (3d) 704 (Gen. Div.).</i></p>	<p>Sister, age 12 Mother, age 48</p>	<p>Age 16, son. Lived with widowed mother and younger sister and assisted on family farm. Anticipated he would take over the farm and provide significant guidance and care to the family.</p> <p>Award:</p> <ul style="list-style-type: none"> ○ \$55,000 to mother ○ \$20,000 to younger sister, Corey
<p><i>Huggins v. Ramtej [1999] O.J. No. 1999 CarswellOnt 1422 (Ont. S.C.J.)</i></p>	<p>Siblings were 20, 17, and 16 at the time of the accident.</p> <p>Mother was 60 at the date of trial.</p> <p>Father's age was not disclosed</p>	<p>Age 15, son. Jason died as a result of a motor vehicle accident. It was a close knit family. Distinguished from <i>Rintoul</i>, as <i>Rintoul</i> was the sole male supporter.</p> <p>Award:</p> <ul style="list-style-type: none"> ○ \$40,000 to each of the parents ○ \$15,000 to each of the siblings ○ Reduced by 25% for contributory negligence.
<p><i>To v. Board of Education (2001), 55 O.R. (3d) 641</i></p>	<p>Sister, 11 years old at time of death</p>	<p>Binh Hoy To was a 14-year old Grade 9 student. He suffered fatal injuries when a net toppled over and crushed his head between the steel frame of the net and the gymnasium floor while doing pull ups during a physical education class at Harbord Collegiate. He was survived by his father Quoc Luong To, his mother, Kiet Linh Luong To and his younger sister, Mary To.</p> <p>Jury award:</p> <ul style="list-style-type: none"> ○ \$100,000.00 to each of his parents and ○ \$50,000.00 to his sister.

		The Court of Appeal upheld the parents' awards, but reduced the award to the sister by half. The circumstances of the case were unique in that the deceased's role as the only son in a Korean family was of import in that particular culture.
<i>Osman v. 629256 Ontario Ltd. [2005] W.D.F.L. 3359 (Ont. S.C.J.)</i>	Father, 56 at time of death. Age of mother not disclosed Age of siblings at trial: 27, 26, 24, 23, 21, 18, 16, 12, 11, 8	16 year old Guled Mohamed was stabbed to death in a nightclub. He was not the only male in the family of 11 children. Award: <ul style="list-style-type: none"> ○ \$80,000 to each parent ○ \$20,000 to each sibling

Bibliography

A) CASES

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 (S.C.C.)

Arnold v. Teno, [1978] 2 S.C.R. 287 (S.C.C.)

Augustus v. Gosset, [1996] 3 S.C.R. 268 (S.C.C.)

Baker v. Bolton (1808), 1 CAMP 493, 170 E.R. 1033.

Bartosek (Litigation Guardian Of) v Turret Realities Inc (2001) O.J. No. 4735

Crawford v Penney, [2003] O.J. No. 89

Courtmanche v. McElwain et al. [1963] 1 O.R. 472 (C.A.)

Dabrowski v. Robertson, [2007] A.J. No. 949

Desbien v. Mordini, [2003] O.J. No. 3369 (S.C.J.)

Dube v. Penlon Ltd., [1992] O.J. No. 4068 (Gen. Div.)

Gervais v. Richard, (1984) 28 M.V.R. 305, 48 O.R. (2d) 191, 30 C.C.L.T. 105, 12 D.L.R. (4TH) 738 (S.C.J.)

Graham v. Rourke (1990), 75 O.R. (2d) 622 (C.A.)

Guimond v. Guimond Estate, [1996]183 N.B.R. (2d) 125, 465 A.P.R. 125 (C.A.)

Huggins v. Ramtej, [1999] O.J. No. 1696, 1999 CarswellOnt 1422 (S.C.J.)

Krangle (Guardian ad litem of) v. Brisco (2002), 208 DLR (4th) S.C.C.

Lee v. Dawson, [2003] B.C.J. No. 1532

Lee v. Dawson, [2006] B.C.C.A. No. 679

Lian v. Money (1994), 93 B.C.L.R. (2d) 16 (S.C.)

Lindal v. Lindal, [1981] 2 S.C.R. 629

Macartney v. Islic, [2000] 46 O.R. (3d) 669, 16 C.C.L.I. (3d) 8, 183 D.L.R (4th) 374, 50 M.V. (3d) 138, 129 O.A.C. 120 (C.A.)

Macartney v. Islic, [2000] 48 C.C.L.T. (2d) 19, 46 O.R. (3d) 641, 16 C.C.L.I. (3d) 38, 183

D.L.R. (4th) 345, 50 M.V.R. (3d) 108, 129 O.A.C. 96, [2000] O.J. No. 30 (C.A.)

Marcoccia v. Gill, [2007] O.J. No. 1333

Mason v. Peters, [1982] O.J. No. 3486, 39 O.R. (2d) 27, 139 D.L.R. (3d) 104, 22 C.C.L.T. 21, 16 A.C.W.S. (2d) 40 (C.A)

Morrison v. Greig, [2007] O.J. No. 225 (S.C.J.)

Nightengale v. Mazerall, [1991] 9 C.C.L.T. (2d) 186, 87 D.L.R. (4th) 158, 121 N.B.R. (2d) 319, 304 A.P.R. 319, 31 A.C.W.S. (3d) 245 (C.A)

Osman v. 629256 Ontario Ltd., [2005] W.D.F.L. 3359, 2005 CarswellOnt 2728 (S.C.J)

Pittman v. Bain (1994), 112 D.L.R. (4th) 482

Ratych v. Bloomer, [1990] 1 S.C.R 940 (S.C.C.)

Rintoul v. Lind Estate (1997), 32 O.R. (3d) 704 (Gen. Div.).

Sandhu (Litigation Guardian of) v. Wellington Place Apartments, 2008 ONCA 215, [2008] W.D.F.L. 3000, 234 O.A.C. 200, 291 D.L.R. (4th) 220, 164, A.C.W.S. (3d) 803 (C.A.)

Sandhu (Litigation Guardian of) v. Wellington Place Apartments, 2006 WL 1682090 (Ont. S.C.J.), 2006 CarswellOnt 3668, [2006] O.J. No. 2448 (S.C.J.)

Semenoff v. Kokan (1990), 45 B.C.L.R. (2d) 294

Sephar v. Beazley, [2004] B.C.C.A. 290

Sherman v. Guckelsberger, [2008] O.J. No. 5322

Teno v. Arnold, [1978] 2 S.C.R. 287

Thornton v. Board of School Trustees of School District No. 57 (Prince George), [1978] 2 S.C.R. 267

To v. Toronto (City) Board of Education, [2001] 204 D.L.R. (4th) 704, 55 O.R. (3d) 641, 150 O.A.C. 54, 107 A.C.W.S. (3d) 1000 (C.A.)

Toneguzzo-Norvell v. Burnaby Hospital, [1994] 1 S.C.R. 114

Wilson v. Martinello (1993), 47 A.C.W.S. (3d) 69 (Ont Gen. Div.)

Yeung (Guardian ad Litem of) v. Au [2004] B.C.J. No. 2623

Yeung (Guardian ad Litem of) v. Au [2007] B.C.J. No. 230

B) ARTICLES AND BOOKS

Adrienne M. Kirsh & David F. Macdonald, "Future Care Costs" online: Thomson, Rogers, <http://www.thomsonrogers.com/files/Future_Care_Costs_Conference_Paper.pdf>

Chris Messerly, "Obtaining Justice when a Child Dies" *Trial* 41:9 (Sept 2005) at 22(6).

Christopher J. Bruce, "Applying Economic Analysis to Tort Law" *The Expert Witness Newsletter* 3:2 (Summer 1998) online: <http://www.economica.ca/ew03_2p2.htm>

Christopher J. Bruce, "Do Sons Follow Their Fathers" *The Expert Witness Newsletter* 1:1 (Spring 1996) online: <http://www.economica.ca/ew01_1p5.htm>

Christopher J. Bruce, "Duty of Care for Orphaned Minors" *The Expert Witness Newsletter* 7:2 (Summer/Autumn 2002) online: <http://www.economica.ca/ew07_2p2.htm>

Christopher Bruce and Kelly Rathje, "Estimating non-discriminatory lifetime earnings for young females" *The Expert Witness Newsletter* 11:1(Spring 2006) online: <http://www.economica.ca/ew11_1p1.htm>

Christopher J. Bruce, "Measure of Damages for the Wrongful Death of a Child" (1987) 66 Can. Bar Rev. 344.

Christopher J. Bruce, "The "Lost Years" Deduction" *The Expert Witness Newsletter* 2:1 (Spring 1997) online: < http://www.economica.ca/ew02_2p1.htm>

Christopher J. Bruce, "The Reliability of Statistical Evidence Concerning the Impact of Disability" *The Expert Witness Newsletter* 9:4 (Winter 2004) online: < http://www.economica.ca/ew09_4p1.htm>

David Smye, "Catastrophic Impairment and the Loss of Interdependent Relationship" online: Mackay Smye Lawyers <http://www.mackaysmye.com/pdf/Catastrophic_Impairment.pdf>

Derek Aldridge, "Using the HALS/PALS data sets to estimate a loss of income" *The Expert Witness Newsletter* 12:1 (Spring 2007) online: < http://www.economica.ca/ew12_1p2.htm >

Diane Dorey et al., "Emerging Trends in Motor Vehicle Liability and Damage Awards" (Paper presented to the Canadian Institute Provincial / Municipal Liability Seminar, February 8, 2008)

Faizal Sharma, "Predicting the Adult Earning Capacity of Minors" *The Expert Witness Newsletter* 12:1 (Spring 2007) online: <http://www.economica.ca/ew02_1p1.htm>

G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002)

Gary Principe, "Proving Economic Damages" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2008 Conference)

Ken Cooper-Stevenson; *Personal Injury Damages in Canada* (Scarborough: Carswell, 1996)

Laura Weir, "Mathematical Mistake: Averaging Multiple Statistical Sources Together to Form One "Overall" Average Income Figure" *The Expert Witness Newsletter* (Spring 2008) online: <http://www.economica.ca/ew13_1p2.htm>

Mohamed Amery, "Predicting post-secondary education attainment" *The Expert Witness Newsletter* 13:1 (Summer 2003) online: <http://www.economica.ca/ew08_2p2.htm>

MROC Munich Insurance Group "Are You Ready for the Future Cost of Care (4 July 2008) online: <<http://www.mroc.com/pdf/are-you-ready.pdf>>

Nancy Ralph, "Lessons from Sandhu" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2006)

Rich Rotstein LLP, "Use Of Statistics Canada 2001 Participation And Activity Limitation Survey (PALS) Data To Determine The Impact Of Disability On Earnings" online: Rich Rotstein LLP <<http://www.richrotstein.com/pdf/PALSDATA.pdf>>

Richard Bogoroch, "Complex Issues in Tort Litigation" (October 2004) online: <<http://www.bogoroch.com/articles/damages.php>>

Richard M. Bogoroch & Kate L. Cahill, "Are Damage Awards on the Rise? Learning Cold Hard Lessons from Recent Negligence-Based Litigation" (Paper presented to the Canada Institute's 10th Annual Reducing the Risk of Hospital Liability and Best Practices for Managing Risk, Adverse Events and Costly Litigation, February 27 2007)

Roger G. Oatley & John McLeish, *The Oatley-McLeish Guide to Personal Injury Practice in Motor Vehicle Cases*, (Aurora: Canada Law Book, 2008)

Statistics Canada, "The 2006 Participation and Activity Limitation Survey: Disability in Canada" online: Statistics Canada <<http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?lang=eng&catno=89-628-X>>

Stephen Kelly, "To v. Toronto Board of Education; Radical Change or Merely Extreme End of the Range" online: Risk Management Counsel of Canada <<http://www.rmc-agr.com/english/index.php>>

Ted Masters, "SABS s 15 - Basket Clause or Horn of Plenty?" (Paper presented to the Ontario Trial Lawyer's Association, Fall 2007)

Therese Brown, "The Children of Immigrants – How Do They Fare?" The Expert Witness Newsletter 2:2 (Summer 1997) online: <http://www.economica.ca/ew02_2p4.htm>

Thomas R. Ireland and John O. Ward, "The Investment Approach to the Death of a Child: A Guide to Understanding Alternative Versions" (1995) 5 J. Legal Econ. 43.

C) STATUTES

Family Law Act, R.S.O. 1990, CHAPTER F.3

Fatal Accidents Act, R.S.O. 1937, CHAPTER 210

Statutory Accident Benefits Schedule, O. Reg. 403/96