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# THE CALCULATION OF DAMAGES FOR BODILY INJURY CLAIMS

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## **I. INTRODUCTION:**

A bodily injury victim is, in principle, entitled to full recovery of past and prospective loss, damage and expense, whether economic or non-economic, insofar as these damages are caused by or contributed to by the wrongdoing and are not too remote. The various heads of damages that are awarded in bodily injury claims fall into one of two categories: 1) pecuniary loss; and 2) non-pecuniary loss. The categorization between pecuniary and non-pecuniary loss provides the foundation for further subdivision of damages. Whereas the compensatory principle is applied to the pecuniary heads, damages for non-pecuniary loss are by way of solace. They are moderated by the social burden of awards and have been judicially “capped” in Canada at a figure that represents the equivalent of \$100,000 in 1978, which is continually adjusted for inflation.

This paper will discuss the major heads of damages that a court will consider in assessing a bodily injury claim and in doing so will provide some guidance on how to assess the likely value of the various heads from a settlement perspective. This paper will conclude with a brief discussion of the provincial government’s statutory rights to recover loss-related health care costs.

## **II. HEADS OF DAMAGE:**

### **A. NON-PECUNIARY DAMAGES:**

#### **i. Non-Pecuniary General Damages:**

Non-pecuniary general damages traditionally encompass 1) pain and suffering; 2) loss of amenities and lifestyle; and 3) loss of expectation of life. This head of damage is assessed globally and is designed to provide solace or consolation to the plaintiff through the purchase of pleasurable goods and services by way of substitution for happiness lost. The plaintiff’s subjective experience of pain and suffering (psychological and physical) and loss of enjoyment of life, not the gravity of the wrongful conduct, is what primarily governs the amount of money required to provide solace. In the Supreme Court of Canada decision *Andrews v. Grand and Toy Alberta Ltd.* Justice Dickson advocated a “functional approach” to the assessment of non-pecuniary damages:<sup>1</sup>

*...To my mind the [functional approach] has much to commend it, as it provides a rationale as to why money is considered compensation for non-pecuniary losses such as*

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<sup>1</sup> (1978), 83 DLR (3d) 452 (SCC)

*loss of amenities, pain and suffering, and loss of expectation of life. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible, accepting that what has been lost is incapable of being replaced in any direct way...Additional money to make life more endurable should then be seen as providing more general physical arrangements over and beyond those relating directly to the injuries. The result is a co-ordinated and interlocking basis for compensation, and a more rational justification for non-pecuniary loss for compensation.*

Compensation for non-pecuniary damages is typically fixed to a conventional sum, the precise figure being set in light of several factors, most notably the size of awards in comparable cases, the amount of medical treatment received, the amount of time missed from work, the activities the plaintiff has or has not abandoned, the effect of the injuries on the plaintiff's prior lifestyle, testimony from the plaintiff's family and friends, the plaintiff's particular need for solace given the extent and duration of the loss, the plaintiff's credibility, the impact of inflation, and the need to avoid any overlap of heads of damage.

The severity of an injury is not solely determinative of the amount of the award for non-pecuniary general damages, and the assessment of such damages is extremely fact-driven. In law, defendants "take their victims as they find them", which is to say that a defendant must compensate the particular plaintiff for that plaintiff's particular suffering and loss. Of course, every plaintiff suffers the effects of an injury differently. One plaintiff may be sensitive to a particular kind of pain, while another suffering a similar injury may be stoic and able to endure the injury with less impact on his or her lifestyle. One plaintiff may recover more slowly than another. Before suffering injury, one plaintiff may have had few hobbies or outside activities, and thus be less affected by an injury that precludes another plaintiff from playing a musical instrument or participating in a favourite sport; a pianist may thus receive greater non-pecuniary award for a permanent disabling wrist injury than would another plaintiff, reflecting the degree to which the pianist's ability to enjoy his or her life may be diminished.

In *Stapley v. Hejslet*, the B.C. Court of Appeal set out that although the loss of lifestyle is but one component for the courts to consider, it will be a significant factor in the courts' assessment of non-pecuniary damages.<sup>2</sup> In *Stapley*, it was reiterated that the purpose of non-pecuniary damages is not necessarily to compensate the plaintiff for the seriousness of the injury, but "to ameliorate the condition of the victim considering his or her particular situation". Accordingly, a non-pecuniary damages award will not always align with the gravity of the injury, but rather will be assessed "with an appreciation of the individual's loss."

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<sup>2</sup> 2006 BCCA 34, at para. 107.

## ii. Judicially Imposed Monetary Cap:

The Supreme Court of Canada, in a trilogy of cases,<sup>3</sup> established a rough upper limit of \$100,000 for non-pecuniary awards. Subsequent decisions established that this rough upper limit should be adjusted for the effects of inflation. As of 2013, the upper limit was approximately \$340,000.<sup>4</sup>

In imposing the cap, the Supreme Court of Canada felt that non-pecuniary damages was “*an area wide open for extravagant claims*” and that there was a “*great need for accessibility, uniformity, and predictability*” in the area of assessing bodily injury damages. The existence of the cap obviously reflects a judicial desire for uniformity and predictability of awards, as well as a marked fear of excessive damages.<sup>5</sup>

The monetary cap does not apply to non-pecuniary damage awards in cases involving defamation, infringement of copyright or for intentional torts of a quasi-criminal nature.<sup>6</sup>

## iii. The Role of Precedent:

The courts try to ensure that similar injuries produce generally similar awards for non-pecuniary damages, so awards made by other courts, both within the jurisdiction in question and across the country are broadly consistent. Non-pecuniary awards are expected to reflect a reasonable degree of fairness between similarly situated plaintiffs. Indeed, the functional approach to the assessment of non-pecuniary damages discussed earlier necessarily involves a comparison of awards made in previous cases involving similar injuries, adjusted to fit the specific factors of a particular plaintiff.

However, the role of precedent in assessing a plaintiff’s non-pecuniary loss at trial differs depending upon whether the matter is heard before a judge or a jury. In a trial before a judge alone, counsel present various cases with comparable allegations of

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<sup>3</sup> *Andrews v. Grant & Toy Alberta Ltd.*, *supra*; *Arnold v. Teno* (1978), 83 DLR (3d) 609 (SCC); and *Thornton v. Prince George School District No. 57* (1978), 83 DLR (3d) 480 (SCC).

<sup>4</sup> \$342,500 in *Clost v. Relkie*, 2012 BCSC 1393 and \$330,000 in *Kim v. City of Toronto and Esplanade 75 Inc.*, 2013 ONSC 6831.

<sup>5</sup> *Andrews*, *supra*, note 3 at p. 477.

<sup>6</sup> In *Y. (S.) v. C. (F.G.)*, [1997] 1 WWR 229 at 239-241 and 253, the British Columbia Court of Appeal held that the “application of the “rough upper limit” (the “cap”) on compensatory damages is not appropriate in cases of damages for intentional torts of a quasi-criminal nature while in *Cinar Corporation v. Robinson*, 2013 SCC 73 at 102-108 the Supreme Court of Canada held that non-pecuniary damages suffered by virtue of defamation or copyright infringement stem from a “material injury” and not a bodily injury, such that the “cap” is not applicable.

injury and argue that similar damages should be awarded. As a result, judges must consider and are heavily influenced by precedent when assessing non-pecuniary damages.

Juries, on the other hand, are not bound by precedent. In fact, the law precludes both judges and counsel from providing jurors with the range of damages that have been awarded in similar cases. Instead, judges must instruct juries to award compensation that is “fair” and “reasonable”. As a result, a civil jury must assess damages based solely on their collective common sense, without influence or knowledge of damages assessments by judges in other cases.

Under Canadian common and statute law the amount of damages to be awarded in a bodily injury claim is a question of fact and not a question of law. As a result, damage awards, whether made by a judge or a jury at trial, are difficult to overturn on appeal. A jury’s award of non-pecuniary damages will not be interfered with unless it falls substantially outside the range of damages awarded by judges in comparable cases. In British Columbia, the test for appellate review is not whether a jury award is merely too high or low with comparable judge-made awards, but rather whether the award is “*that ‘rare case’ where it is ‘wholly out of all proportion’ or, in other words, when it is ‘wholly disproportionate or shockingly unreasonable.’*”<sup>7</sup> In practice, perhaps ironically, this means comparing the non-pecuniary damage awards given by trial judges in similar causes of action.<sup>8</sup>

#### **iv. Publications Listing Bodily Injury Award Quantums:**

Counsel researching bodily injury awards often consult publications that provide case summaries, organized by injury or body part. Such publications are often found in courthouse libraries and include:

- *Goldsmith’s Damages for Personal Injury and Death in Canada* – Goldsmith’s is a multi-volume set digesting cases originating throughout Canada. It is arranged in yearly volumes by type of injury. It contains a Consolidated Table of Damages arranged by injury type.
- *Personal Injury Damage Assessments: British Columbia* – This source provides BC decisions on all types of damage awards. Digests

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<sup>7</sup> *Moskaleva v. Laurie*, 2009 BCCA 260, at para. 127.

<sup>8</sup> *Taraviras v. Lovig*, 2011 BCCA 200, at paras. 42-43.

summarize the facts, including the monetary award, names of the parties, court level, and citation.

- *British Columbia Decisions: Civil Cases (B.C.D.)* - This source summarizes decisions of the BCSC, BCCA, and selected Provincial Court decisions. Digests are arranged under the heading "Personal Injury Damages - Quantum for specific injuries".

Internet and Electronic resources frequently utilized include:

- *CLE Online* - Case digests concerning personal injury damages can be found by browsing by topic. Many digests link to full text judgments. This electronic subscription service is offered free of charge in BC courthouse libraries with Internet access.
- *Western Decisions Civil Digests* - This source contains cumulative databases for civil decisions from British Columbia, Alberta, Saskatchewan and Manitoba from 1980 onwards. The personal injury template allows you to insert search terms specifying the various injuries sustained as well as gender and age of plaintiff.
- *CanLII (The Canadian Legal Information Institute)* - This source, while not specific to personal injury, is maintained by the Federation of Law Societies of Canada, and provides easy and free web-based access via a boolean search function to a substantial collection of recent and historical Canadian judgments.

## **B. PECUNIARY DAMAGES:**

By contrast to non-pecuniary damages, pecuniary damages are losses that can be quantified in monetary terms (with varying degrees of precision). They fall in several distinct categories, or “heads of damage”, as described below.

### **i. Special Damages:**

Special damages encompass all pre-trial pecuniary and out-of-pocket losses suffered by the plaintiff and include loss of income and medical expenses up to the date of trial. Special damages must be specifically pleaded and proven. The test for any expense claimed is reasonableness. Types of special damages routinely claimed include the plaintiff’s cost of transportation to and from medical appointments, therapy user fees, damaged or destroyed clothing, medication paid out of pocket, and rental car charges.

### **ii. Past Loss of Income:**

Damages for past loss of income are quantified on the basis of what the plaintiff would have earned up to the date of trial had the injury not occurred. Past wage loss assessments are by nature somewhat hypothetical, and require assumptions be made to address various contingencies that might have arisen. Still, the court’s analysis may be guided to some extent by the plaintiff’s actual pre-injury earnings. In cases involving loss of commission income, a reasonable projection of post-accident commissions over a given period may be based upon pre-accident performance, performance of comparable commissioned salespersons, or both.

### **iii. Future Loss of Income:**

Damages awarded for loss of *future income* are distinct from those awarded for loss of *earning capacity* (discussed further below), though in many cases these heads of damages are “rolled” into one amount. A plaintiff may be entitled to compensation for one or both of them.

Lost future income is generally more easily quantified than lost earning capacity. An injured plaintiff is compensated for the income he or she would have earned in the future but for the accident. In cases where the plaintiff is still not working at the time of trial, courts estimate when he or she will likely return to work and grant an award based on the present day value of that estimated loss.

A plaintiff's future loss of income is generally calculated by taking the following steps:<sup>9</sup>

- determine the plaintiff's annual earnings at the time of the accident;
- deduct from that amount any sum the plaintiff will likely earn after trial;
- multiply that figure by the number of earning years during which the diminished earnings are expected to last;
- discount that sum to arrive at a present value figure; and
- apply positive and negative contingencies, *e.g.*, whether the plaintiff would have earned more from his employment absent the accident, whether the plaintiff might have been forced to cease work due to age or other health conditions unrelated to the accident, etc.

The standard of proof for deciding matters that have already happened is the balance of probabilities. The standard of proof lowers to "simple probability" when the court turns its attention to future losses. Accordingly, plaintiffs need only show the simple probability that they would have continued working at their pre-loss job until retirement at 65 in order to show their entitlement to the lost wages.

#### **iv. Loss of Earning Capacity:**

A loss of earning capacity award is distinct from a future loss of income award in that there may be no certainty as to expected date of return to work from injury, if any, and no certainty as to how much the plaintiff might lose from his or her earnings during any convalescence.

Accordingly, the Supreme Court of Canada has described earning capacity as a capital asset.<sup>10</sup> Like any other asset, its value may well be distinct from the use to which we put it. For example, an individual working below his capacity would prefer to maintain the *ability* to work at a higher capacity. Another example is an individual who has two

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<sup>9</sup> See for example, *Tom v. Truong*, 2002 BCSC 643 at paras. 140 to 146, affirmed 2003 BCCA 387, where the court commented on the method of calculating loss of future income in a case where this made up a component of the plaintiff's loss of future earning capacity claim.

<sup>10</sup> *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, at p.252.

marketable skills, but whose current position utilizes only one of those skills. Certainly the loss of the other skill is a compensable loss to the plaintiff.

The purpose of a loss of earning capacity award was set out by the British Columbia Court of Appeal in *Palmer v. Goodall*:<sup>11</sup>

*Because it is impairment that is being redressed, even a plaintiff who is apparently going to be able to earn as much as he could have earned if not injured or who, with retraining, on the balance of probabilities will be able to do so, is entitled to some compensation for the impairment. He is entitled to it because for the rest of his life some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income earning ability. [Emphasis added]*

Any injury that causes a permanent impairment or disability will support a claim for loss of earning capacity. The test for determining whether one's earning capacity has been impaired so as to warrant an award is a test of "*real and substantial possibility of a future event leading to an income loss*" as set by the British Columbia Court of Appeal in *Perren v. Lalari*.<sup>12</sup> The onus is on the plaintiff to discharge this burden of proof.

Courts have listed and relied repeatedly on 4 factors for consideration in making this type of award.<sup>13</sup> These are:

- Has the plaintiff been rendered less capable overall of earning income from all types of employment?
- Is the plaintiff now less marketable or attractive as an employee to potential employers?
- Has the plaintiff lost the ability to take advantage of all job opportunities that might otherwise have been available to her had she not been injured?
- Is the plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?

When assessing loss of capacity claims courts will consider the type of disability and how it could potentially affect the plaintiff's future occupation. The courts will make

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<sup>11</sup> (1991), 53 BCLR (2d) 44 (CA).

<sup>12</sup> 2010 BCCA 140.

<sup>13</sup> *Miller v. Lawlor*, 2012 BCSC 387, at para. 114, citing *Brown v. Golaiy*, [1985] 26 BCLR (3d) 353 (SC).

this assessment based upon a “capital asset approach”, where an arbitrary figure (literally plucked out of the air) is awarded, or an “earning approach” in which the assessment is made using specific calculations of potential lost income. The former will be preferred when the loss of earning capacity is not easily measurable (such as when the plaintiff has lost the ability to take advantage of all future career options) while the latter will be preferred when the loss can be calculated with more precision (such as when all evidence suggests the plaintiff will remain in the same career, but with known restrictions, the effect of which can be calculated in the plaintiff’s future income).

For example, in *Hildebrand v. Musseau*,<sup>14</sup> the court employed the capital asset approach in awarding \$250,000 to a young car mechanic who returned to the same type of employment, but whom was left with a partial disability that closed the door on other labour options he may have considered in the future.

In *Danicek v. Alexander Holburn Beaudin & Lang*,<sup>15</sup> the court employed the earnings approach in the case of a lawyer who suffered a career-ending brain injury early in her legal career. The court awarded her the present day value of her future stream of potential earnings assessed on the assumption that she would likely have become a partner in a private practice law firm.

Similarly, in *Wallman v. John Doe*,<sup>16</sup> perhaps the high water mark for loss of earning capacity awards, the plaintiff was an emergency room physician who could no longer work due to a mild traumatic brain injury. The court concluded that he would likely have earned approximately \$346,000 annually, but for the injury. On an “earnings approach” net present value basis, his future loss of earning capacity from his medical practice was calculated to be \$3,665,169.

Since there can never be any “hard and fast” evidence as to the future, each of the “capital asset” and “earnings” approach is equally arbitrary. Such was the implication in *Pallos v. ICBC*.<sup>17</sup>

Plaintiffs must prove that they have been permanently disabled or impaired as a result of the accident and that such disability or impairment will affect their employability. Generally, only expert medical evidence will suffice to prove this permanent impairment.

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<sup>14</sup> 2010 BCSC 1022.

<sup>15</sup> 2010 BCSC 1111.

<sup>16</sup> 2014 BCSC 79.

<sup>17</sup> [1995] BCJ No 2 (QL)(CA).

This is often done using expert evidence, both objective, in the form of labour market statistics, and subjective, looking at the characteristics of the plaintiff. The British Columbia Court of Appeal has held that it is important to look at the individual in question while being guided by the expert evidence.<sup>18</sup> An assessment of the individual will often involve looking at their prior work history. Although the plaintiff may establish a loss of capital asset, the court may reduce the award on the basis that it was unlikely the plaintiff would have been employed to his or her full potential, given the plaintiff's pre-injury history:<sup>19</sup>

*As I said above, when looking into the future the task is to evaluate the possibilities according to the percentage chance that they would have happened. Having done this, I am strongly of the view that the plaintiff's claim for loss of future earning capacity is grossly overstated. It too blithely assumes an entirely unheralded revolution in the plaintiff's attitude towards employment. It does not adequately account for the fact, which I will emphasize for the last time, that the plaintiff has no durable history of vocational discipline or hard work. He has not shown the sort of mettle that could persuade me beyond a modest percentage chance that he might have been capable of full-time, career-long labour in a remote and forbidding climate such as Fort McMurray.*

Some examples of claims for lost earning capacity include:

- Plaintiff A works as a unionized data entry clerk. She loses her left leg in a boating accident. Her return to work 3 months after the accident coincides with her second anniversary in that position. Her seniority increases and she receives a 5% increase in salary. While she has no claim for future wage loss, and indeed is earning more money post-accident than pre-accident, she is nonetheless entitled to compensation for lost earning capacity, since some occupations she may have wished to pursue are now foreclosed by the permanent disability.
- Plaintiff B is a high school student who sustains a mild head injury. The plaintiff is no less intelligent after the accident, but he now requires more time to perform simple mathematical and verbal functions. Certainly the plaintiff is no longer as marketable for certain positions and he will therefore be unable to take advantage of every occupational opportunity. Presumably he is also less valuable to himself as a person capable of earning income in a competitive labour market. Given a lack of employment history,

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<sup>18</sup> *O'Brien (Guardian ad litem of) v. Anderson*, 2000 BCCA 460, at para. 23.

<sup>19</sup> *Riding-Brown v. Jenkins*, 2014 BCSC 382, at para. 45.

the assessment of his loss of capacity will be largely based on labour participation rates, along with subjective evidence of his grades to date, interests and educational and vocational achievements of near family members.

In claims for children and young adults who have yet to establish a career history, the courts quantify future income losses more globally, as illustrated by the British Columbia Court of Appeal in *Sinnott v. Boggs*:<sup>20</sup>

*In the case at bar, [the plaintiff] is a young person who has not yet established a career and has no settled pattern of employment. In such circumstances, quantifying a loss is more at large. Southin J.A. commented on this distinction in Stafford:*

[42] *That there can be a case in which a plaintiff is so established in a profession that there is no reasonable possibility of his pursuing, whether by choice or necessity, a different one is obvious. For instance, on the one hand, if a judge of this Court were to be permanently injured to the extent that he or she could no longer do physical, in contradistinction to mental, labour, he or she would have no claim for impairment of earning capacity because the trier of fact gazing into the crystal ball would not see any possibility that the judge would ever abandon the law for physical labour, assuming that immediately before the accident the judge was capable of physical labour. But, on the other hand, if a plaintiff is young and has no trade or profession, the trier of fact gazing into the crystal ball might well consider whether the impairment of physical ability will so limit his future employment opportunities that he will suffer a loss. [emphasis added]*

In summary, factors that a court will consider in assessing loss of future income and loss of capacity claims include:

- What is the plaintiff's family background? Are many members of the plaintiff's family university educated or highly skilled? What career paths have the plaintiff's siblings chosen? What steps had the plaintiff taken with regard to career planning?
- What occupational choices has the plaintiff made? For example, in today's economy, a 22-year-old plaintiff who planned to become a logger will have a considerably bleaker earning projection than the had he or she planned to become an occupational therapist or computer programmer.

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<sup>20</sup> 2007 BCCA 267

- What sort of labour market participation rates apply to the plaintiff's peer group? Are the plaintiff's socio-economic and cultural peers participating in the labour market?
- What sort of unemployment rates might affect workers in occupations similar to that of the plaintiff?
- Could the plaintiff become a voluntary or involuntary part-time worker? How will part-time work affect the plaintiff's income projections?
- Does the plaintiff plan to live abroad, perhaps in a region with different standards of living and different average income levels?
- Is the plaintiff a member of a minority group that has historic legacy of lower earnings – and should historical disadvantage be factored into wage projections?
- To what extent are wage tables appropriate for certain workers? For example, in the case of a 25 year old male plaintiff who works for the City of Edmonton driving a waste disposal truck, using average incomes of 50 year olds in the same industry will likely yield a higher income than the plaintiff would actually have earned. This is based on the expectation that low skilled jobs will not pay as well in the future as they do now.

**v. Loss of Housekeeping Capacity:**

Recent judicial decisions have considerably altered the traditional approach taken by judges in awarding compensation to plaintiffs who have lost the capacity to work in the home and as a result, many pursue a claim for loss of housekeeping or loss of housekeeping capacity.

Historically, when an individual lost the capacity to work in the home, a court would award damages to a third party, usually a family member taking on the homemaking responsibilities of the injured family member. Typically an award would be granted to a family member "in trust", and in most cases damage awards were relatively low. Recent decisions in Saskatchewan, Alberta, and other Canadian jurisdictions have held that plaintiffs are entitled to be compensated in their own right for the loss suffered.

With this change in approach has come a corresponding significant increase in the quantum of damages being awarded under this head of damages. It is important that defendants and their insurers be aware of these potential claims, and take proper steps to increase reserves, and minimize exposure whenever possible.

The leading case in this area is *Fobel v. Dean and MacDonald*.<sup>21</sup> In this decision the 51-year-old female plaintiff was severely injured in an automobile accident. Prior to the accident she worked full-time in the family bakery business and was the primary caretaker in the home. At trial she was awarded \$60,000 for non-pecuniary damages for pain and suffering, loss of amenities, future loss of earning capacity, and for pre- and post-trial loss of housekeeping capacity. No award was specifically made for lost homemaking capacity.

The Saskatchewan Court of Appeal overturned the trial decision and awarded specific compensation for her loss of capacity to work in the home. The Court explained that the old approach of compensating a third party for loss of services provided to the third party by the claimant was "*antiquated, if not sexist*." The Court went on to conclude that the claimant should be compensated directly for the "loss" suffered rather than to award damages to a third party.

The Court explored five approaches to quantifying a loss of housekeeping capacity. These are: replacement of earning capacity; opportunity cost; replacement cost; substitute homemaker and catalogue of services. The Appeal judge concluded that the most equitable approach would be to combine the "substitute homemaker" theory with the "catalogue of services theory". The substitute homemaker approach was described as compensation "for what it would cost to replace an injured homemaker to perform "all the tasks" not just domestic labour, performed by a person of equal ability and qualifications." The catalogue of services approach involves assigning the homemaker's time to a number of occupations such as chef, nurse, counsellor etc, and that time is multiplied by the community's fair market salary of each occupation and is totalled to arrive at a weekly salary.

The court then went on to divide the homemaker's services into two major headings. The first group consisted on those skills that involved direct labour, such as cooking, cleaning and washing clothes (*i.e.* labour). The second skills group related to the management of the home, and involved activities such a meal planning, tutoring and counselling (*i.e.* management). The division between the two skills groups was necessary, as many injured homemakers are unable to provide the first type of services but remain able to provide the second.

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<sup>21</sup> (1991) 93 Sask. R. 103 (C.A.)

Having concluded that the Plaintiff would continue to be disabled into the future and would therefore require domestic assistance to put her back into the position she would have been but for the motor vehicle accident, the court found that estimating the cost of employing labour for the remainder of the plaintiff's life to provide homemaking assistance would be a proper measure of damages. It was also held that it would not be necessary for the plaintiff to actually prove that someone would be hired to do the work as she had suffered a loss of housekeeping capacity and was therefore entitled to compensation.

The court reviewed the plaintiff's level of disability, took into account the fact that her youngest child was likely to leave home shortly and concluded that 15 hours of assistance per week would be reasonable compensation for the loss of the direct labour component of her loss of capacity. There was no evidence led relating to the management component of the plaintiff's homemaking, but there is a suggestion that had such evidence been led, that this aspect of the claim would have been allowed or at least considered.

Lastly, the court went on to determine whether a pre-trial loss of housekeeping ability should be assessed under a heading of non-pecuniary damages when the plaintiff did not in fact employ replacement labour. The court concluded that this loss must be viewed as a loss of amenity *i.e.* part of the award for non-pecuniary damage. Ultimately, the court calculated the pre-trial loss of housekeeping capacity as a separate non-pecuniary damage and awarded \$15,000.

The reasoning in *Fobel* has been followed in several decisions decided by the Alberta Court of Queen's Bench.<sup>22</sup>

The British Columbia Court of Appeal endorsed the approach to housekeeping capacity awards in *Fobel* in the case of *Kroeker v. Jansen*<sup>23</sup>. In *Kroeker*, the Court of Appeal specifically extinguished a line of judicial authority which had previously held that a plaintiff was not entitled to compensation for loss of housekeeping services that could reasonably be expected to be taken over by spouses or family members in the ordinary course of the marriage or family relationship. The court looked at three series of judgments to illustrate the emergence of a different approach to housekeeping claims. This "different approach" ultimately adopted by the court, recognizes that "housekeeping and other spousal services have economic value for which a claim by an

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<sup>22</sup> See for example: [Adeshina v. Litwiniuk & Company](#), 2010 ABQB 80 and *Fandrick v. Reitberger*, 2009 ABQB 703.

<sup>23</sup> April 6, 1995 (unreported) Vancouver Registry No. CA015461 (BCCA)

injured party will lie even where those services are replaced gratuitously from within the family.” The court reviewed, and agreed with the principles set forth in *Fobel* and the English Court of Appeal decision of *Daly v. General Steam Navigation*<sup>24</sup> which was adopted in *Fobel*.

The decision in *McIntyre v. Docherty*<sup>25</sup> appears to set Ontario apart from the majority of other jurisdictions in Canada, in the sense that it held a non-pecuniary loss of housekeeping award should not be made under a separate head of damages, but rather assessed within the plaintiff’s general damage award. The Ontario Court of Appeal found the approach set out in *Fobel v. Dean and MacDonald* overly complex. However, the Ontario Court of Appeal acknowledged that a plaintiff is not required to demonstrate that he or she will retain the housekeeping services of others in order to receive an increased general damages award.

It is important to remember that when a file involves a claim for housekeeping services it does not mean that a large award will necessarily follow. Notwithstanding the principles established in *Fobel* and *Kroeker*, awards under this damage head can be relatively modest as the courts recognize that there is overlap among certain household tasks and that professional housekeeping services can be utilized at relatively low cost to contain these awards. Thus the following rules will help to further minimize an insurer’s exposure in this area:

- Defend the file as if claims of this nature were non-existent. Many plaintiffs counsel are unaware of the existence of this type of claim and are equally unaware of how to present it. By keeping silent on the issue, you may not have to address the claim at all.
- Do not permit opposing counsel to simply multiply the number of hours by which the plaintiff's ability to work has been reduced by the hourly fee charged by a professional. A professional will take less time to perform the service and will generally do a better job.
- Remember that many activities can be done at the same time. For example, both laundry and child care services are such that there may be some duplication in hours worked.

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<sup>24</sup> (1980), 3 All E.R. 475

<sup>25</sup> 2009 ONCA 448 at 52.

- When dealing with future losses, keep in mind the age limits involved. As people get older, their abilities to perform these tasks will decline anyway.
- Consider whether to retain a rehabilitative specialist. A rehabilitation specialist may be able to provide an opinion that, with the proper rehabilitation program, the plaintiff will have an increased tolerance for household activities in time.
- Be aware of the distinction made between pre-trial claims and post-trial claims.

#### vi. In-Trust Claims:

In trust awards are made by the courts as a separate head of damages to compensate individual third parties, often family members of the plaintiff, who voluntarily provide housework, nursing and domestic assistance to the injured plaintiff. Generally, a plaintiff is able to claim damages for services offered voluntarily by third parties, even if these third parties were not paid. These voluntary services provided by third parties are compensable in the form of an “in trust” claim. The underlying theory behind an in trust award is that a tortfeasor should not benefit from the willingness of a victim’s family to provide services in regards to the damages to be paid.<sup>26</sup> This has been expressed by the Ontario Court of Appeal in *Yepremian v. Scarborough General Hospital*,<sup>27</sup> as: “entitlement to recover for the reasonable cost of such care cannot be denied because the necessary care and assistance has been provided by a member of [the plaintiff’s] immediate family.”

In order to qualify for an in trust award, the service must be made necessary by the plaintiff’s injuries, the services must be rendered to or on behalf of the plaintiff, and these voluntary services must not be services that would ordinarily be provided by a dutiful spouse or parent. Factors that are helpful in determining whether the services provided were beyond those of a dutiful spouse or parent include whether the plaintiff would have otherwise had to pay a professional for those services and whether they went beyond services typically provided in the particular familial relationship.

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<sup>26</sup> Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2ed (Toronto, Ontario: Carswell, 1996 at p. 178.

<sup>27</sup> (1980), 13 CCLT 105 at 154-55.

To establish the in-trust claim, the plaintiff must prove on a balance of probabilities that:

- The third party providing the services experienced socioeconomic loss because of the time and effort that went into performing those duties; or
- The third party's efforts resulted in replacing expenses, which would otherwise have been incurred, such as hiring a housekeeper.

An in trust award may be made, even where there is no evidence that the household work performed replaced the costs of hiring someone to do the housekeeping. However, in trust awards will not be made for services that the plaintiff received that would reasonably have been provided in any event out of the natural love and affection of family members. Compensation should only be awarded when the services provided extend above and beyond what would be expected. Services in the nature of those which would have otherwise been provided by professionals at a cost are compensable.

An example of the ambiguous nature of in-trust claims is childcare as between the injured plaintiff and his or her spouse. Where childcare provided by the plaintiff's spouse is necessitated by the plaintiff's injuries and, had the spouse not provided this care, a caregiver would be necessary, it still may be questionable whether the spouse would have provided the childcare *but for* the plaintiff's injuries. One factor in support of childcare being beyond that of a typical spousal relationship is whether the plaintiff's spouse missed work in order to provide the care. The standard against which this must be judged is the care the plaintiff's spouse would have provided the child if not for the plaintiff's injury caused absences.

The amount of an "in trust" claim can be quantified in a variety of ways and has sometimes been calculated based on the wage loss of the third party spouse who provided the services. While wage loss may still be taken into account in considering whether the services provided were beyond a typical spousal relationship, in British Columbia the practice of awarding an amount greater than the replacement value of the service in favour of the amount foregone by the third party providing the service has been rejected.

While there are several different methods of quantifying in trust claims, all must meet the basic "but for" test: "*what services would not have been provided but for the injuries?*"<sup>28</sup> It

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<sup>28</sup> Cooper-Stevenson, *supra* note 27 at p. 180.

is notable that the love, care and attention family members would normally provide is not compensable, such as time spent helping a plaintiff cope while in hospital.<sup>29</sup>

Canadian courts have generally relied on three methods for quantifying “in trust” awards.<sup>30</sup> This most commonly used approach is “replacement cost” which simply asks what the cost of a substitute caregiver would be if one had been hired to perform the services being claimed. However, there has been a tendency to characterize the services provided by family members as domestic rather than medical, which has resulted in an undervaluation in some cases.<sup>31</sup>

A second approach is the “catalogue of services”, where services provided are itemised, the market value replacement of the services are found, and the average daily, weekly, or monthly replacement value is calculated. This method is more suitable for ongoing and diverse aid provided by family members, where a clear total replacement cost cannot be easily ascertained. This method is not often used, as generally a clear replacement cost is easier to calculate, although this approach has influenced quantification in several British Columbia decisions.<sup>32</sup>

The final approach is the “foregone income: opportunity cost” approach, which is no longer applied in British Columbia *Bystedt v. Hay*<sup>33</sup> and *Crane v. Worwood*.<sup>34</sup> This approach holds that where the provider of services has given up income in order to render those services and the value of the forgone income is greater than the value of the services provided, it may be appropriate to award the larger amount of the income actually lost.<sup>35</sup>

An example of the court’s approach to in-trust claim can be found in *Bystead v. Hay*<sup>36</sup>. This case involved a medical malpractice suit for severe damage caused to a child born with a herpes simplex infection that was not properly treated by her physicians. The mother of the infant plaintiff made an in trust claim for the care requirements of her daughter. The court provided a list of factors to be considered:

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<sup>29</sup> *Lankenau v. Dutton* (1989) 56 DLR (4<sup>th</sup>) 364

<sup>30</sup> Cooper-Stevenson, *supra* note 27 at pp. 180 – 187.

<sup>31</sup> Cooper-Stevenson, *supra* note 27 at p. 182.

<sup>32</sup> *Thornton v. Prince George School District No. 57* [1976] 5 WWR 240 at 262; *Malat v. Bjornson (No. 2)* [1979] 4 WWR 673 at 704-06; *Lankenau v. Dutton*, *supra* note 30 at 368-70.

<sup>33</sup> *Bystedt v. Hay*, 2001 BCSC 1735 and *Crane v. Worwood*, (1992) BCLR (2d) 16

<sup>34</sup> (1992) BCLR (2d) 16

<sup>35</sup> *Sunston v. Russell* (1921), 21 OWN 160

<sup>36</sup> 2001 BCSC 1735, *aff’d* on appeal, at para. 180.

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those service. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discontinuing or undervaluation of such services because of the nature of the relationship; and,
- (f) the family members providing the services need not forego other income and there need not be payment for the service rendered.<sup>37</sup>

Ultimately, the court calculated the "in trust" claim by using the same rate paid to professional caregivers of the child, applying it to the hours of care provided by the plaintiff's mother (40 hours per week over more than eight years) and coming to a total figure. This figure was then discounted to take into account the services that would normally be provided by a mother to a child had she not suffered any injury. The court concluded that 30% was an appropriate reduction in this case.<sup>38</sup>

#### **vi. Cost of Future Care:**

Cost of future care is a pecuniary loss payable to cover the medical expenses necessary to sustain the plaintiff's mental and physical health. Damages for cost of future care are awarded to provide physical arrangements for assistance, equipment and facilities directly related to the injuries. Items that are regularly awarded under the future care head include attendant care, transportation cost and medical equipment and accessories. The purpose of a cost of future care award is to restore the injured plaintiff

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<sup>37</sup> *Ibid.*.

<sup>38</sup> *ibid* at para 184.

*“to the position he would have been in had the accident not occurred, insofar as this can be done with money.”*<sup>39</sup>

The test for cost of future care is whether there is medical justification for the claimed future expense and whether that expense is reasonable.<sup>40</sup> In assessing the reasonableness of claim for cost of future care, the courts will consider whether the quantum of the proposed expenditure is moderate and fair to both parties.<sup>41</sup> The British Columbia court has held a future care award must strike a balance between providing the plaintiff with quality of life and pampering the plaintiff.<sup>42</sup> The standard of proof for establishing the necessity of a proposed medical expenditure in a cost of future care claim is the test of “substantial possibilities”.

Canadian court’s approach “medical justification” and “reasonableness” vary considerably depending on whether the claim involves catastrophic injuries, where the plaintiff’s entire future life has been radically altered because of an accident, or whether the claim involves less serious are involved. The driving considerations are reasonableness and fairness, as illustrated by the following passage:

The “total lifestyle” approach is appropriate where the plaintiff’s entire future life has been radically changed because of his or her injury...The plaintiff needs a totally different environment and totally different care than he would have required had she or he not been injured. The simplest and fairest approach is to award him all these costs and make a deduction for loss of future earnings from what would have been spent on basic necessities.

The “additional expense” approach is preferable where the plaintiff will continue to lead basically the same life as he would have had he not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance and facilities that the plaintiff will require.<sup>43</sup>

An award made under the “total lifestyle” approach, typical in traumatic brain injury cases, can reach significant levels, with large variances seen depending on whether the plaintiff is awarded the cost of home or institutionalized care. There is no principle that home care is to be awarded in every case, and each case must turn on its circumstances in determining what the level of care ought to be.<sup>44</sup>

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<sup>39</sup> *Milna v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff’d (1987), 49 B.C.L.R. (2d) 99 (C.A.).

<sup>40</sup> *Abdereen v. Zanatta*, 2007 BCSC 993, aff’d on this point 2008 BCCA 420

<sup>41</sup> *Brito v. Woolley*, 2001 BCSC 1178

<sup>42</sup> *Sunston v. Russell*, *supra* note 36 at para 142.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Lusignon (Litigation Guardian of) v. Concordia Hospital*, [1997] M.J. No. 197 (Q.B.)

Where home care is awarded, the quantum of damages can be significant, as seen in the recent Ontario catastrophic brain injury case of *Marcoccia v. Ford Credit Canada Limited* (cost of future care award of \$13,952,00)<sup>45</sup>. In contrast, in the recent British Columbia catastrophic brain injury decision of *MacEachern v. Rennie*,<sup>46</sup> the plaintiff also suffered a traumatic brain injury necessitating care for the balance of her life, similar to the plaintiff in *Marcoccia*. With regard to future living arrangements, the trial judge awarded the less expensive option of group assisted living as opposed to independent living with home care. The award of group home care still resulted in cost of future care award of \$5,275,000, although this was significantly lower than if home care was found reasonably necessary, as was the case in *Marcoccia*.

Of significance, where a plaintiff's injuries have shortened his or her life expectancy, the cost of future care award is to reflect their now limited life duration; there are no future care costs to be incurred following a plaintiff's death.<sup>47</sup>

#### **vii. Tax Gross Up Awards, Management Fees and Discount Rates**

Where a plaintiff receives a sizeable award for future damages, the court may award tax gross up and management fees.

Tax gross up awards are made to compensate the plaintiff for taxes it will pay on its investment earnings. Courts typically discount future damage awards to their net present value on the basis that it is to be expected that the plaintiff will invest the future damage award to compensate for inflation. However, the plaintiff will be taxed on investment earnings. To compensate for these yet to be incurred taxes, the court will make a 'tax gross up award'. Expert economist evidence is typically necessary to assist the court with the proper calculation of this award and available tax credits and tax minimization strategies.

Tax gross up awards are not made with respect to damages for loss of future income or earning capacity. This is because it is expected that the plaintiff would have paid taxes on any employment income earned, but for the plaintiff's injuries.

Management fees are awarded by the court to compensate a plaintiff for the cost of hiring an investment manager to handle the investment of their damages award. These are more often awarded where the plaintiff has limited investment experience, limited

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<sup>45</sup> 2009 ONCA 317

<sup>46</sup> 2010 BCSC 625

<sup>47</sup> *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735

education or the plaintiff has suffered a traumatic brain injury necessitating the need for a third party to manage the plaintiff's monetary award. The test for whether a management award is necessary is "*whether the plaintiff's level of intelligence is such that he is either unable to manage his affairs or lacks the acumen to invest funds awarded for future care so as to produce the "requisite rate of return" (i.e, a real rate of return equal to the discount rate used to calculate the present value of future damages.*"<sup>48</sup>

The onus is on the plaintiff seeking the investment management fee to provide evidence of its necessity and cost.

However, provincial governments are at liberty to enact regulations setting the appropriate discount rate. These are used to perform a net present value calculation to determine the amount of a cost of future care or loss of future income award. Where a province has set a prescribed discount rate, such as with British Columbia's *Law and Equity Act's* regulations,<sup>49</sup> the Supreme Court of Canada has held that, because of "...*the deeming provision, parties no longer need to adduce evidence on the rate of return.*"<sup>50</sup> In those circumstances, the Supreme Court of Canada has held that is not open to the court to reduce the claimed management fee by the amount the investment manager can be expected to exceed the prescribed discount rate.<sup>51</sup>

Several provinces, in addition to British Columbia, have legislated discount rates. Prescribed discount rates are meant to avoid over compensating a plaintiff while standardizing the calculation of future damages awards. Alberta and Newfoundland do not have prescribed discount rates. To determine the real rate of return used to calculate future damage award in these provinces, parties must lead expert evidence, typically with respect labour productivity, interest and inflation factors. In Ontario, rather than set a discount rate, the province prescribes a calculation formula to determine the appropriate rate of return to be used to calculate the present value of the plaintiff's future damages.

In British Columbia, the discount rate was recently lowered to 2% for cost of future care (from 3.5%) and to 1.5% for future income loss (from 2.5%)<sup>52</sup>. The lowering of the discount rate increases the present value of a plaintiff's future damages. For instance,

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<sup>48</sup> *Yeung (Guardian ad Litem of) v. Au*, 2007 BCSC 175 citing *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650

<sup>49</sup> *Law and Equity Regulation*, BC Reg 352/81

<sup>50</sup> *Townsend v. Kroppmanns*, 2004 SCC 10

<sup>51</sup> *Yeung (Guardian ad Litem of) v. Au*, 2007 BCSC 175 citing *Mandzuk v. Insurance Corporation of British Columbia*, [1988] 2 S.C.R. 650

<sup>52</sup> *Law and Equity Regulation*, BC Reg 352/81

the present value of \$10,000 to be provided over 10 years, for a total of \$100,000, is \$83,166 using a 3.5% discount rate, but increases to \$89,826 using a 2% discount rate.

### III. PLAINTIFF'S DUTY TO MITIGATE

Plaintiffs who are injured have an obligation to take reasonable steps to mitigate their injuries. Personal injury victims cannot sit back after the accident and allow their losses to accumulate.

In practice, this means the plaintiff has a duty to undertake all reasonable rehabilitation, pain management and medical intervention efforts, as well as all reasonable employment and/or vocational retraining opportunities<sup>53</sup>. In other words, a plaintiff cannot collect damages for losses that could have been avoided,<sup>54</sup> nor can a plaintiff sit back after the accident and allow his or her losses to accumulate. A plaintiff must take all reasonable steps to avoid these losses.<sup>55</sup> To the extent the plaintiff fails to do so, this failure is available as a defence to reduce the quantum of the plaintiff's damages.

The onus is on the defendant to prove that the plaintiff could have avoided certain of his or her losses by undertaking mitigation steps. The defendant must prove that the plaintiff acted unreasonably in not pursuing certain mitigation steps, such as not opting for a potentially corrective surgery or not applying for certain jobs that may have been available and accommodating of the plaintiff's injuries. Once this is established, the Defendant then must also prove the amount by which the Plaintiff's damages would have been reduced, had the Plaintiff undertook these reasonable mitigation efforts.

The question of whether a plaintiff has been reasonable in refusing to carry out certain steps which may have reduced the extent of the plaintiff's damages is one for the court to decide on a factual basis. The factors the court will consider to assess the reasonableness of this refusal include the degree of risk or harm to the plaintiff from any proposed medical or rehabilitation treatment or employment opportunity, the gravity of the consequences of the refusal, and the potential benefit to be derived from acceptance.<sup>56</sup> This analysis is carried out on a "subjective/objective" standard by considering whether a "reasonable person" in the plaintiff's situation would have undertaken the mitigation steps suggested by the defendant.<sup>57</sup>

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<sup>53</sup> *Janiak v. Ippolito*, [1985] 1 S.C.R. 146

<sup>54</sup> *Sevinski v. Vance*, 2011 BCSC 892

<sup>55</sup> *Rahimi v. Ma*, 2014 BCSC 710

<sup>56</sup> *Ostrikoff v. Oliveira*, 2014 BCSC 531 citing *Janiak v. Ippolito*, *supra*, note 54.

<sup>57</sup> *Gregory v. ICBC*, 2011 BCCA 144

#### IV. PROVINCIAL RECOVERY OF HEALTH CARE COSTS:

If a person is injured in an accident caused by someone else's wrongdoing, and makes a claim for damages or initiates a lawsuit, provincial governments across Canada can recover the cost of some of the related healthcare and treatment provided through statutorily based rights of subrogation. Each province's right of recovery applies to any incident regardless of the location. This includes other provinces, and foreign jurisdictions that allow subrogation or other reimbursement rights.

In Ontario, the Ministry of Health's right of recovery is rooted in the *Health Insurance Act*, Section 30-36 and Regulation 552, Section 39, and in the *Long Term Care Act*, Section 59 (ss. 1-13). The Ministry of Health recovers the cost from insurance companies (or directly from at fault parties) for all OHIP-insured health services provided up to the time of settlement or judgment. It also claims the costs for future insured healthcare services that an injured person may need.

Where an injured person has been assessed for long-term care services and benefits, funding is provided on a bridge or interim basis until all settlement funds have been received. The Ministry's claim includes these costs, and the subrogation unit endeavours to contact funding agencies upon settlement.

In Ontario, the most common examples of bodily injury accidents for which the Ministry of Health recovers healthcare and treatment costs include slip and falls, boating, air and rail accidents, product liability or manufacturing defects, medical malpractice or professional negligence, dog bites, municipal liability, assaults, some motor vehicle accidents and class actions. Typically, the Ministry is notified by the injured person, their legal counsel, or occasionally by the at-fault party's liability insurer. The Ministry can recover costs for:

- OHIP insured services including physician services, hospital services including in/out patient, acute and chronic care, air ambulance and out of province medical and hospital services;
- Extended care services typically administered through Community Care Access Centres in a home, health facility or school; and
- Non-professional services required to the date of settlement of judgement at trial including homemaking services, personal support or attendant care, long-term accommodation and services

in nursing homes, and community support services such as meals and transportation.

In Ontario, subrogation does not apply for future non-professional healthcare services or benefits (such as attendant care, personal support and homemaking). The injured person must include a claim for the cost of these services in his or her personal claim for damages. Once settlement funds are received, he or she must purchase these services directly.

In British Columbia, the *Health Care Costs Recovery Act* (the “HCCRA”) provides for a right of subrogation by the provincial Ministry of Health to recover the costs of hospital expenses incurred in relation to an injured party. The Ministry may bring its claim by intervening in ongoing proceedings, bringing a subrogated action in its own name or the name of the plaintiff, or via an independent right of action. There has been very little jurisprudence to date considering the HCCRA, however, the B.C. Courts have held that if the Ministry pursues an independent right of action, it will be bound by any findings in the plaintiff’s personal injury action.<sup>58</sup> Plaintiffs are required to notify the Ministry within 21 days of commencing in conjunction with any claim where the plaintiff has received hospital services and defendants and their insurers must provide notice to the Ministry of a potential settlement and obtain the Ministry’s consent before entering into any such settlement. A court action cannot be discontinued until the Ministry’s consent is received.

Alberta has enacted the *Crown’s Right of Recovery Act* (the “CRRRA”) which is similar to B.C.’s HCCRA, save for it does not provide for right to intervene in ongoing proceedings, but does provide for the Ministry to bring a subrogated action in its own name or to bring its claim via an independent action. Alberta’s CRRRA also does not require that the Ministry’s claim be dealt with within the plaintiff’s litigation, but provides that the plaintiff must notify the Ministry as soon as possible after consultation with counsel, and where a defendant has insurance, for the Ministry to be notified as soon as possible after a settlement or judgment.

## V. CONCLUSION

This paper is intended to encapsulate the various heads of damages that can be awarded in a personal injury action and the basis on which these awards are adjudicated. Ultimately, each case will turn on its own unique set of facts and

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<sup>58</sup> *British Columbia v. Tekavec*, 2013 BCSC 2312

circumstances. But a clear pattern emerges: aside from general damages for physical and lifestyle effects of an injury, which are capped, the courts will endeavour to make the injured plaintiff monetarily whole. That is, to provide the injured plaintiff, along with parties who have suffered a loss as a result of assisting or treating the injured plaintiff, with an award that imagines what position the parties would have been in had the accident which caused the plaintiff's injuries not occurred. The calculation of such awards is often imprecise and typically requires the courts to engage in 'crystal ball gazing', which exercise relies on a host of factors developed through the personal injury jurisprudence.