DAMAGES – GUARDIANSHIP EXPENSES

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INTRODUCTION

Brain injury can render a person incapable of managing their property and their personal affairs. Where that brain injury is caused by medical negligence, the responsible defendants are liable to compensate the plaintiff for anticipated expenses associated with the management of a substantial award of damages. Typically, large damages awards in medical malpractice cases are generated primarily by the assessment of future care needs. Future income loss may also be a very large component of the assessment of damages. Impaired brain function which precludes the injured person from managing large sums means that others will have to step in to manage the estate on their behalf. Considerable expense may be associated with this process for the person charged with managing the funds and the oversight of the process by the Courts and the Public Trustee and Guardian.

Under the Rules of Civil Procedure, the injured person is considered a person under disability when the person is "mentally incapable", as defined in section 6 or 45 of the Substitute Decisions Act, 1992.[1] A person may be incapacitated from managing personal care or managing property. Those so incapacitated will have their decisions made by guardians of their property and guardians of their person. The need for guardianship and the costs associated with it are payable by the defendant when the evidence establishes that the need arises from the defendant's wrongdoing.

This paper will consider the damages that should be sought and awarded in connection with guardianship issues, in cases where the medical negligence renders a person incapable of managing their affairs. If the resulting brain injury precludes the plaintiff from managing funds, considerable assistance may be needed. Often, that assistance comes from multiple sources, including family members, financial advisors and professional estate managers.

To some extent, managing the monetary award to the plaintiff can be simplified to a degree when placed in a structured settlement. In medical malpractice cases, future care awards[2] shall be satisfied by way of periodic payments.

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[1] See Rule 1.03(1) of the Rules of Civil Procedure.

[2] Exceeding the prescribed amount of $250,000 pursuant to section 116(13) of the Courts of Justice Act.

These tax-free annuities result in monthly payments, often with some protection from inflation built in, which can provide a lifetime of payments as and when needed. Structured settlements, as will been seen, do not obviate the need for additional damage awards needed for managing the plaintiff's award. Where a plaintiff can show that paying all or part of the future care award into a structure is unjust, the court retains the discretion to make a lump sum award.[3]

As an aside, evidence should be led on the matter of the amount that might be needed to offset the effect of income tax (gross-up). Where evidence can justify the setting aside of a lump sum, presumably placed in capital markets, on account of future unpredictable changes in circumstances, gross-up would be payable (if the fund is from categories of damages to which gross-up applies). To the extent that a plaintiff demonstrates the injustice of tying up all the future care funds in a structure, again gross-up should be paid.

It is important to recognize that the failure to provide for damages associated with the management of the plaintiff's award is a serious omission. Proper oversight of the proceeds is necessary to ensure that funds are not squandered, that capital is preserved as needed and that the care needs of the injured person are met in the long term. If additional sums are not proven in anticipation of these claims, the principle amounts awarded for non-pecuniary loss, income and care will be inappropriately eroded, leaving a shortfall.

In cases involving plaintiffs who have not suffered brain injury causing incapacity to manage their affairs, courts are still willing to award damages to manage trial awards. In Morrison v. Greig[4] a plaintiff with orthopaedic injuries was awarded 4% of the future care and future income claim, or $447,164.80, as a management fee. While the rationale is not well-developed in the reasons, the management fee was awarded, at least in part, due to the plaintiff's lack of experience in investing and managing money.

SUBSTITUTE DECISION MAKERS

Children are, by definition, persons under a disability. Decision making for children is governed by the Children's Law Reform Act. For persons at least 18 years of age, the governing Act is the Substitute Decisions Act 1992.

Obtaining guardianship of the property of a person deemed incapable can be a costly and time-consuming process. Applicants for guardianship must follow the steps prescribed in the Substitute Decisions Act. Applications must include details about how the person's estate is to be administered, called a "management plan". The Act imposes a duty on the guardian as a fiduciary

[3] Courts of Justice Act, section 116.1(8).
[4] Morrison v. Greig, [2007] 46 C.C.L.T. (3d) 212.

requiring a guardian to act "diligently, with honesty and integrity and in good faith, for the incapable person's benefit".[5]

DISPOSITION OF THE PLAINTIFF'S AWARD

The expense associated with guardianship can be determined only when the disposition of the plaintiff's award has been determined. Generally speaking, in cases of sufficient magnitude to justify meaningful guardianship damages, the plaintiff's award is likely to be invested in both an annuity and the capital market. No settlement of a claim for a person under disability can be made without court approval.[6] Any money payable to a person under disability must be paid into Court, unless a judge orders otherwise.[7] The rules, however, are silent on how settlement funds may be held on behalf of a person under disability. Despite the reference to payment into court, in cases of the nature being discussed, that is never the preferred option.

Inevitably, the matter of guardianship costs will be a matter for the trial judge alone. Guardianship costs cannot be considered until damages have been determined. Once damages have been determined, the judge retains the discretion to determine the disposition of those funds. Whether some of the award is placed in a structure, some paid into court and some into the capital markets, the way the money is divided up will impact on the costs associated with guardianship.

It has become widely accepted that damages, at least on account of future care awards, are ordinarily paid into an annuity to benefit the injured person. Annuities are beneficial in many respects. These are secure investments that deliver a certain and guaranteed return. They are tax exempt and ensure that the principle sum invested cannot be squandered. With an annuity, the guardian need not be concerned about investing or re-investing the principle amount used to acquire the annuity. There are negative sides to annuities. Annuities are inflexible once purchased, making adaptations to changing circumstances difficult. In some cases, annuities may not keep up with inflationary changes. In times of relatively low interest rates, many financial professionals believe that annuities may not be the best vehicle for the plaintiff in the long run. Some argue that a least part of a plaintiff's award ought to be placed in the capital markets, in some sort of balanced fund designed to provide reasonable returns without undue risk.

In Sandhu v. Wellington[8] the plaintiff was awarded over $12.6m by the jury. The plaintiffs had proposed to place $7.5m in a structure and over $5m in the capital

[5] See section 32 of the Substitute Decisions Act 1992.
[6] See rule 7.08(1) of the Rules of Civil Procedure.
[7] Rule 7.09.
[8] Sandhu v. Wellington, (2006) W.L. 1682090 (Ont. S.C.J.).

market. The trial judge rejected this suggestion, ordering that almost $11m be placed in a structure, with the balance of $3m to be invested elsewhere if an appropriate investment strategy can be demonstrated. It is significant to note that the amount of about $11m which had to be structured was the exact amount awarded for future care needs. In considering what to do with the balance of $3m, the court considered the following options:

1) Place in a balanced portfolio in the capital market;
2) Put $1.2m in a capital fund, and structure the rest;
3) Pay the entire amount into court.

Payment into court was not considered a reasonable option. It is cumbersome to have funds released as needed and would increase the costs. There would be accounting fees charged by the Accountant of the Supreme Court which would be avoided by selecting a different disposition.

The trial judge recognized the inflexibility of a structure. Once the funds are invested, no changes can be made. The ability to adapt to changing circumstance for the injured person justifies investing a portion of the award outside the structure. It is suggested that the arguments considered by the trial judge would go so far as to justify that even a portion of the future care costs be diverted from the structure. That will be an argument for another case.

In Sandhu the trial judge quite appropriately noted that a structure annuity does not attract tax, while an investment in the capital markets will. Ordinarily future tax liabilities are off-set by an award of gross-up, which was not claimed in this case. As the future care costs were entirely invested in an annuity (leaving only the income loss and non-pecuniary general damages), there was no reason to consider gross-up. Only if a portion of the future care award was placed in the capital market would there have to be some consideration of a gross-up for future income tax liability. Where it will be argued that damages in this category ought not to be structured, evidence should be called on the matter of gross-up.

There was evidence called in Sandhu about the difficulty in purchasing structures that pay based on actual inflationary increases. The plaintiffs argued that the risk that a structure would not keep pace with inflation was another reason to permit placing a larger portion of the award in the capital market. The trial judge, however, rejected this argument, pointing out that the assessment of the plaintiff's future care award already took this into account under Rule 53.09(1).[9] There was a suggestion that the discount rate was insufficient to offset inflation as health care costs tend to rise quicker than the general inflation rate. The judge pointed out that the time to raise that issue was at trial, not after damages had been awarded. This would be addressed only by using a discount rate that reflects this fact (i.e., lower than the prescribed rate).

[9] That is, the present value calculation takes into consideration the difference between interest and inflation through the discount rate.

DAMAGES IN CONNECTION WITH GUARDIANSHIP

Three categories of damages in connection with guardianship will be looked at. The first is compensation for individuals, often family members, who agree to serve as guardians of the injured persons property and person. Often these guardians are not particularly sophisticated in financial planning and management. They are required to manage funds, maintain meticulous records and account for their actions. The second category is concerned with compensation to professional guardians, often trust companies, bringing professional skills to the management of an estate. As will be seen, circumstances can justify the provision of both an individual guardian and a professional guardian. The third category involves legal fees that may be incurred from time to time in connection with a variety of events that arise over time, described below.

Like proving other future events, the onus on the plaintiff is to prove "a real and substantial risk" of incurring guardianship costs. These claims need not be proved on a balance of probabilities. Where these damages are proved as a possibility, the damages recovered with reflect the percentage possibility of incurring the expense. Thus, the higher the risk, the higher the award.

Amounts awarded for guardianship are considered in the context of the nature of the injury suffered by the plaintiff. Depending on the nature of the injury, each case will present unique challenges for the guardians.

(A) INDIVIDUAL GUARDIANS OF PROPERTY

Guardians of property are appointed pursuant to the Substitute Decisions Act. A considerable degree of responsibility comes from acting as guardian for a person under a disability. Managing the property and accounting to the court for how the property has been managed can be a time-consuming and onerous responsibility. In Marcoccia v. Gill[10] the court recognized the requirement that the guardian act at all times in the best interests of the injured person, exercising a "fiduciary, non-delegable duty", the breach of which duty brought serious consequences. Appropriately, a guardian is entitled to be compensated for their efforts.[11]

There can be more than one individual guardian. As well, individual guardians can be appointed jointly with professional guardians. Guardians may have to be replaced from time to time as well. Parents acting as guardians for their disabled children will often pre-decease the child.

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[10] Marcoccia v. Gill (2007), WL 1091530 (Ont. S.C.J.)
[11] See section 40(1) of the Substitute Decisions Act, 1992.

Section 40(1) of the Substitute Decisions Act, 1992, allows guardianship fees. Regulation 26/95 provides;

> 1. For the purposes of subsection 40(1) of the Act, a guardian of property…shall be entitled, subject to an increase under subsection 40(3) of the Act or an adjustment pursuant to a passing of the guardian's…accounts under section 42, to compensation of,
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> a. 3% on capital and income receipts;
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> b. 3% on capital and income disbursement; and
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> c. 3/5 of 1% on the annual average value of the assets as a care and management fee.

The larger the assets to be administered the lower the percentage that ought to be charged by the guardian. Smaller estates may require considerably more effort and time relative to the size of the estate, which would justify an increase in the prescribed amounts.

In Sandhu, the individual guardian was to be appointed with the professional guardian. It was recognized that the individual guardian would not be directly involved in the investment strategies or the accounting with respect to income and receipts. The individual's responsibilities were seen as liaising with family members and caregivers, as well as ensuring that funds were being used in the best interests of the disabled person. The defendant argued that the work of the professional guardian meant that there was little that the individual guardian needed by way of compensation. The defence position was rejected by the trial judge. Some of the duties the individual guardian would have include:

- meeting with the corporate guardian at least annually;
- receiving and reviewing reports from the corporate guardian;
- considering future changes in the investment portfolio;
- seeking directions from the court from time to time;
- working with caregivers;
- co-ordinating care;
- interviewing care providers;
- dealing with matters of personal care;

The court then recognized five factors to be considered when determining fair and reasonable compensation for a guardian:

1. the magnitude of the trust;
2. the care and responsibility involved;
3. the time occupied in performing the duties;

4. the skill and ability shown; and
5. success resulting from administration.

The trial judge in Sandhu allowed $7,500 per year for the individual guardian. The present value of that annual amount calculated over the plaintiff's life expectancy came to $268,800. In Marcoccia, the trial judge awarded an annual amount of $5,000 (for a present value calculation of $161,250, reduced to $98,363 after contributory negligence), based on his observation that Mr. Marcoccia was "somewhat more functional in his day-to-day activities than was young Mr. Sandhu".

(B) PROFESSIONAL GUARDIANS OF PROPERTY

When referring to Professional guardians of property, one would generally consider a Trust company. Other financial professionals, accountants for example, may, in some circumstances, qualify to be a professional guardian. Trust companies tend to be preferred over other professionals. One advantage is that a Trust company does not have to be bonded under the Substitute Decisions Act, but a non-corporate guardian would.

Professional guardians develop an investment strategy which presumably will focus on maximizing return while protecting the principal invested. The professional guardians consult with the individual guardian to develop a management plan that is ultimately presented to the court for approval.

The role of the professional guardian varies depending on the mix between structure and capital market investment. The more money placed in a structure the more the role is administrative, tracking income and expenses and disbursing funds. Trust companies are in the business of managing money and are generally seen as a more appropriate guardian.

The compensation to be paid to a professional guardian is calculated in the same manner as an individual guardian. When there are joint guardians, the tendency is to split the allowable compensation between them. Generally, in the case of joint guardians, the professional guardian will be permitted a larger share of the compensation in recognition of the extra work and expertise they bring to those aspects of administration left for the professional guardian. With the benefit of working with a professional guardian, the individual can avoid the challenge and tedium of bookkeeping and accounting, not to mention the research needed to develop sound investment strategies.

In Sandhu the corporate guardian was appointed at an annual cost of $23,328. The present value calculation resulted in an award for professional guardianship fees of $1,127,000. In Marcoccia the trial judge allowed $715,557, before adjustment for contributory negligence.

(C) LEGAL FEES

Guardianship commences with an application to appoint a guardian. After an order is made for the management of the plaintiff's award, the guardian will be required periodically to demonstrate to the court and the Public Guardian and Trustee that the money has been appropriately managed. This will be done through regular passing of accounts (through which the court essentially reviews the conduct of the guardians and the way the estate has been managed). From time to time there may be the need to obtain advice and direction from the court. There may be periodic changes in investment plans. The need to appoint new guardians may arise. All of these events expose the plaintiff to expense. These events need to be anticipated and amounts awarded to the plaintiff to offset these costs.

Proving claims for legal fees will be proved through lawyers. A lawyer who specializes in Estate and Trust Law should be retained to deliver an expert report predicting these expenses and be prepared to testify if required. A reliable opinion needs to be based specifically on the circumstances of the individual plaintiff.

The frequency of the passing of accounts will likely have the most impact on anticipated future legal fees. Commonly, accounts are passed every two years.

In Sandhu, the estimates of anticipated legal fees varied widely. In the end, the trial judge awarded $400,000 on account of future legal fees. In Marcoccia the trial judge allowed an assessment of $389,009, which was then reduced for contributory negligence.

No two cases are the same. In the approach to damages for legal fees, the following are things to consider under each category:

a) The initial application for guardianship may involve a detailed management plan and oversight by the Public Guardian and Trustee. It is conceivable that several drafts and amendments may be required following input from the PGT. At the time of the initial application (or perhaps with subsequent management plans) consideration must be given to the number of trustees and whether both individual and professional trustees ought to be appointed. Occasionally, different family members may have conflicting views which will have to be managed and reconciled. In Sandhu the evidence regarding the cost of the initial application ranged from as low as $4,000 to as high as $40,000. While the exact figure attributed to this item was not set out, a reasonable level is likely in the range of about $20,000 in most complicated case.

b) Subsequent applications for guardianship may be required. Clearly one needs to consider the age of the incapable person and the relative age of the first guardian. Each subsequent application is unlikely to be as costly as the first. With appropriate evidence, it would be easy to justify a fee of about $15,000.

c) Passing of Accounts should be anticipated to occur every two or three years. Guardians and respondents are entitled to their legal fees under Tariff C of the Rules of Civil Procedure, based on receipts for the period covered. Assuming uncontested passing of accounts, each will likely cost between $5,000 and $6,000.

d) On occasion the guardians may seek advice and direction from the court. It is difficult to anticipate if such applications will be required and how complex the issues are. The age of the plaintiff will obviously be a factor here. An application every decade or so is probably not unreasonable, at a cost of between $7,500 and $10,000.

e) In the interim between passing of accounts and applications for advice, periodic legal advice about the administration of the estate can be reasonably anticipated. An allowance of $2,000 a year would be reasonable for this service. An estate lawyer should testify about his or her experience in these matters to justify this cost.

f) Changes in the injured person's health or circumstances may call for amendments to the management plan on occasion. The age and nature of the person's injuries will be a factor in predicting this potential expense. Allowing a cost of $7,500 for each anticipates change to the management plan would be reasonable. Again, the evidence of an estate lawyer to support the cost and frequency will be needed. At the same time, the need will be significantly influenced by the health of the plaintiff.

EVIDENTIARY REQUIREMENTS

As stated above, evidence from an experienced estates lawyer will be required to prove guardianship damages. Based on the frequency of the passing of accounts, the estates lawyer can estimate the fees and disbursements associated with each application. There then needs to be a calculation of the present value of those costs over the life expectancy of the injured person. There will also be administrative costs involved which need to be costed.

Future events need to be anticipated and presented by the estates lawyer. Experience with the frequency of replacing guardians needs to be discussed, with the costs associated with these events.

Where professional guardians are appointed, ordinarily a Trust Company, a representative of the Trust Company should report and testify about their experience, anticipated costs and fees and how their fee structure fits in with the guidelines under the Act. It is wise to canvass more than one professional guardian to ensure competitive rates and to ensure the guardian has the experience and expertise required.

The burden of proof is on the plaintiff. As in proving other future events, however, the plaintiff merely has to demonstrate a "real and substantial risk" of incurring the expenses. Care must be taken to ensure that the anticipated costs are not in the realm of speculation.

CONCLUSIONS

Guardianship costs are of particular importance in medical malpractice actions. Damages are not constrained by policy limits issues. In Sandhu the costs associated with guardianship totalled $1,795,800. In Marcoccia, before liability, the costs totalled $1,265,816. These are significant numbers, not to be ignored by plaintiffs' counsel in developing the case on damages.