

DUPLICATION IN PERSONAL INJURY DAMAGES AWARDS

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In the trilogy, the Supreme Court of Canada dealt inconsistently with the problem of overlap between the care and earnings heads of damage. In Andrews and Thornton the court awarded the gross cost of care under the care head, and deducted for necessity expenses not caused by the tortfeasor under the earnings head. This is conceptually incorrect and it may make a significant difference to the size of the award. The approach in Teno may have been correct, but it is difficult to review or to apply correctly. This article suggests a "net cost of care" approach which should be adopted as a matter of law.

La Cour suprême du Canada dans la trilogie n'a pas suivi la même voie quand il s'est agi de décider des dommages intérêts accordés pour les soins et de ceux accordés pour les gains qui empiètent les uns sur les autres. Dans Andrews et Thornton, la Cour a placé sous la rubrique des soins le coût brut des soins et déduit de la rubrique des gains les dépenses nécessaires qui n'avaient pas été causées par l'auteur du délit. Ceci dénote un concept incorrect et peut créer une différence appréciable des montants accordés en dommages intérêts. Le point de vue adopté dans Teno est peut-être correct mais il est difficile de l'étudier ou de l'appliquer fidèlement. L'auteur de ce texte suggère l'adoption, en droit, d'un "coût net des soins".

In *Andrews v. Grand and Toy Alberta Ltd.*,¹ Dickson J. devoted considerable attention to the issue of potential duplication under the future care and lost earning capacity heads of damage. He described accurately the source of the potential problem as follows:²

It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing, and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.

In that the court had included compensation for these basic necessities under the future care head of damages, it concluded that the earning capacity award must be reduced to avoid potential duplication. The Supreme

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¹ *Andrews v. Grand and Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, (1978), 83 D.L.R. (3d) 452.

² *Ibid.*, at pp. 250 (S.C.R.), 468 (D.L.R.).

Court took the same approach in *Thornton v. School District No. 57 Board of School Trustees*,³ and apparently also in its later decision in *Lindal v. Lindal*.⁴ On the other hand, in *Arnold v. Teno*,⁵ the award for future care did not include compensation for basic necessities, and hence the court did not find it necessary to make any adjustment under the lost earning capacity head of damages. This is the approach approved by the House of Lords.⁶

The Supreme Court has never addressed the discrepancy on this issue which appears within the trilogy itself. Perhaps at that time it was assumed that the two approaches were equivalent. Today, it is well-recognized that the choice of approach may make a significant difference in the eventual size of the damage award for the following reasons:

- (1) The basic necessities which are provided under the future care head of damages to meet expenditures which the plaintiff is actually predicted to incur in the injured condition are likely to be quantitatively different from the necessity expenditures which the plaintiff would have incurred on the premise that he or she had not been injured.
- (2) The life expectancy periods relevant to each head of damages is likely to be different.⁷
- (3) The contingency deduction, if any, under each head of damages is likely to be different.
- (4) In some jurisdictions, notably Ontario, the future care award will be "grossed up" to reflect anticipated tax consequences;⁸ the earning capacity award is not "grossed up".

Both approaches appear in the current case law.⁹ The courts have not, however, attempted to justify one approach over the other as a

³ *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, (1978), 83 D.L.R. (3d) 480.

⁴ *Lindal v. Lindal*, [1981] 2 S.C.R. 629, (1981), 129 D.L.R. (3d) 263.

⁵ *Arnold v. Teno*, [1978] 2 S.C.R. 287, (1978), 83 D.L.R. (3d) 609.

⁶ *Lim Poh Choo v. Camden and Islington Area Health Authority*, [1980] A.C. 174, [1979] 2 All E.R. 910 (H.L.).

⁷ The difficulty with the different life expectancy periods may be disposed of separately. There is authority in the House of Lords, presumed by Waddams to constitute the law in Canada as well, that the personal living expenses which the victim would have incurred before the accident should be deducted from that portion of the lost earning capacity assessment which reflects the "lost years". If this is done as it should be, potential duplication is only possible during the same post-accident life expectancy. See *Pickett v. British Rail Engineering Ltd.*, [1980] A.C. 136, [1979] 1 All E.R. 774 (H.L.); *Gammell v. Wilson*, [1982] A.C. 27, [1980] 1 All E.R. 578 (H.L.); S. Waddams, *The Law of Damages* (1983), para. 413.

⁸ See, for example, *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. H.C.); *Fenn v. Peterborough* (1979), 104 D.L.R. (3d) 174 (Ont. C.A.).

⁹ Despite the apparent preference for the *Andrews/Thornton* approach in the Supreme Court of Canada, the *Teno* approach continues to be used in recent cases; see for example, *Schmidt v. Sharpe*, *ibid.*.

matter of principle. Often, it would appear that the choice of approach is one of local preference, or one of the many items available for negotiation by counsel, it being generally recognized that the *Andrews/Thornton* approach is more advantageous to the plaintiff than the *Teno* approach.¹⁰ Below, I will argue that the *Andrews/Thornton* approach is incorrect in principle, and the *Teno* approach suspect in practice.

The difficulty with the *Andrews/Thornton* approach is that it begins by violating the basic restitutionary principle of tort damage law. Under this principle, the plaintiff is not entitled to the full cost of future care, but only to the increased cost of care occasioned by the accident. In *Andrews* and in *Thornton* no attempt is made to quantify the net change in the cost of future care occasioned by the accident under the future care head of damages. Perhaps motivated by the "paramount concern . . . to assure that there will be adequate future care",¹¹ the court awarded the "gross" or full cost of future care under the future care head of damages. The court's recognition of this violation of the restitutionary principle led it to make a subsequent deduction for potential duplication.

The error in *Andrews/Thornton* lies in making that deduction from the lost earning capacity award. A deduction of the amount which the plaintiff is predicted to spend on basic necessities on the presumption that he or she had not been injured is appropriate, but appropriate under the future care head, not under the lost earning capacity head. This is the accurate means by which the "net cost of future care" occasioned by the tort may be computed. Once this is done, it follows that no deduction for potential duplication is appropriate under the lost earning capacity head.

When the adjustment is made within the future care head of damages, the correct net figure is then multiplied by the court's prediction of the duration of the expense. Under the *Andrews/Thornton* approach, the duplication deduction is projected for the work life expectancy period, a period which bears no necessary relationship to the duration of future care. Similarly, new changes in the cost of future care occasioned by the tort should be adjusted to take into account the contingencies relevant to future care, not the contingencies relevant to earning capacity as under the *Andrews/Thornton* approach. Most significantly if a "gross up" is justified at all, the "gross up" should only apply to the net change in the cost of future care. Under the *Andrews/Thornton* approach, the "gross up" is applied to the gross cost of future care, often to the considerable detriment of the defendant.

¹⁰ This is noted by E.A. Cherniak, *Proof of Pecuniary Damage* (1983), 4 *Advocates' Quarterly* 257, at p. 262.

¹¹ *Andrews v. Grand and Toy Alberta Ltd.*, *supra*, footnote 1, at pp. 261 (S.C.R.), 476 (D.L.R.).

Correctly applied, the *Teno* approach is preferable to the *Andrews/Thornton* approach, and will produce exactly the same award as will result from the modified *Andrews/Thornton* "net cost of care" approach suggested above. Under the *Teno* approach, the court, in effect, performs the two steps outlined above simultaneously to arrive at a net figure directly. This is done by assessing under the future care head of damages only the cost of future care occasioned by the tortfeasor, and excluding from that head of damages the amounts which would have been required for basic necessities in any event. The shortcoming of the *Teno* approach is that it is often extremely difficult to perform both steps of the process simultaneously without making an error. This assumes quantitative importance when, as is generally the case, necessity expenditures in the injured condition are different from necessity expenditures which the victim would be predicted to incur had he or she not been injured.

Consider first the case in which the cost of necessities in the projected care setting is greater than the amounts which the plaintiff would have spent on such necessities in the uninjured condition. Assume that the projected monthly cost of future care is \$1400, consisting of \$600 in necessity expenditures, and \$800 in other expenditures. Assume that the victim would be predicted to spend \$200 on necessities in an uninjured condition. Under the "net cost of care" approach suggested above, the *Andrews/Thornton* approach employed within the future care head of damages, the future care award should be calculated using a base figure of \$1200 per month. This figure is arrived at by computing the gross cost of care at \$1400, and reducing it by \$200 to determine the net change caused by the tortfeasor. The damage award then properly reflects the increase in the necessity component of the cost of care occasioned by the tortfeasor. Note that under this approach it is not necessary for the court to itemize the care expenditures and classify them as either necessity or non-necessity expenditures. A \$200 deduction from the undifferentiated gross cost of care will give the correct result.

In contrast, in order for the *Teno* approach to be accurate, the court must be able to separate the necessity components from the other aspects of the future care award. To the extent that it is unable to do so accurately, which is not a remote possibility, the award will be inaccurate. It must also recognize that necessity expenditures in the care setting will be different from those in a projected uninjured condition. Otherwise, there is a risk that the court will only award the plaintiff \$800 for other expenditures, excluding necessity costs from the future care award. Implicit in so doing is the assumption that the necessity expenditures in the injured condition are the same as those in an uninjured condition, which they are not. For the *Teno* approach to work properly, the court must award both the \$800 in other expenditures, and the \$400 (\$600-\$200) increase in necessity expenditures occasioned by the injury. The *Teno* approach,

therefore, is more susceptible to error in application than is the modified *Andrews/Thornton* approach applied within the future care head of damages.

Consider also the case of a high income earner, for example, who may reasonably be predicted to spend a great deal more on basic necessities in an uninjured condition than those same items will cost in an institutional setting. Assume, for example, that in addition to \$800 of other care expenses there are \$200 in necessity expenditures in the care setting, whereas the victim would be predicted to have spent \$600 in an uninjured condition. The proper future care award is obtained by subtracting the predicted \$600 expenditure from the \$1000 gross cost of care, resulting in a \$400 base figure. Under the *Teno* approach, assuming that the \$200 in necessity expenditures may be isolated from the other expenditures for future care, there is a risk that the court will award the plaintiff \$800 for the same reasons given in the paragraph above. This would result in overcompensation for the plaintiff. The same restitutionary principle which demands that the defendant be held liable for the net increase in necessity expenditures in the first case also requires that the defendant be given "credit" for the net savings in necessity expenditures when that should occur.¹²

This is not to say that the *Teno* approach is never suitable. In less severe cases, often the victim will continue to live at home, and to eat and dress in precisely the same manner as he or she would have done before the accident. In such cases, all the future care expenditures may be awarded directly. Of course the *Andrews/Thornton* approach applied within the future care head of damages will amount to the same thing, this being a case in which no deduction for duplication is appropriate. In cases of catastrophic injury, it will frequently be impossible to isolate items of basic necessity expenditure from the overall cost of institutional care, and the modified *Andrews/Thornton* approach must be used.

In summary, the court should attempt to determine the net change in the cost of care, whether an increase or decrease, occasioned by the tortfeasor. This net figure must be arrived at within the future care head of damages. In no case will it be appropriate to make a deduction for duplication under the entirely different lost earning capacity head of damages as was done in *Andrews/Thornton*. In theory, either the *Teno*

¹² There is admittedly an apparent injustice in the reduction of the tortfeasor's liability to reflect the savings in necessity costs, in that the victim is obviously not indifferent to necessity expenditures in the institutional setting as compared to what they would have been had he not been injured. Presumably the accommodations are considerably less luxurious, the meals less enjoyable, the clothing less fashionable. This, I suggest, could be addressed by adjusting upwards the amount of damages under the non-pecuniary head to reflect the non-pecuniary loss of amenities experienced by the plaintiff. To the extent that this is not possible under the "functional approach" this is a shortcoming of the functional approach.

approach or the modified *Andrews/Thornton* approach which effects the duplication deduction within the future care head of damages will prove satisfactory. In practice, there is a substantial risk of error when using the *Teno* approach, which suggests that the modified *Andrews/Thornton* approach is to be preferred.