QUANTIFYING DAMAGES IN
OBSTETRICAL MALPRACTICE CLAIMS

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INTRODUCTION¹

Damages in obstetrical malpractice actions became a focus of attention among litigators after the decision in *Crawford*.² In *Crawford*, a 57 day trial in front of Ottawa's Honourable Justice Denis Power resulted in a $10 million dollar award that was affirmed by the Court of Appeal. The decision dealt with a multitude of liability and damages issues.

As the title of this paper denotes, the within subject-matter will concentrate on issues related to quantifying damages in obstetrical malpractice claims: this paper does not address considerations such as standard of care or causation.

The heads of damages in cases involving obstetrical malpractice are not dissimilar from the heads of damages in other personal injury actions. This paper will probe a number of issues that are germane to assessing damages in obstetrical malpractice actions and attempt to offer some insight into them.

A fundamental premise of this paper is that the plaintiff has sustained a catastrophic injury which involves a serious brain injury caused by obstetrical misadventure or a compromised spinal cord.

Typical heads of damages in these cases will be as follows:

- Non-pecuniary general damages
- Special damages
- Future loss of earnings
- Future care costs
- Loss of opportunity for an interdependent relationship

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¹ This paper was finalised during the week of December 18, 2006.
The nature of the damages for these types of injuries can be summed up in one word...."substantial".

LIFE EXPECTANCY

It is of critical importance to carefully explore all facts which may relevant to establish a foundation for determining the plaintiff's pre and post life expectancy. A reduction of either life expectancy will significantly reduce the defendant's exposure for damages.

The medical histories of immediate family members such as siblings and parents may be relevant since there are many insidious and life threatening diseases which a plaintiff may be pre-disposed to suffering, such as bowel cancer, breast cancer, diabetes, or even arthritis. These family members will often be named as Family Law Act claimants so they can be questioned directly on these issues during their discoveries. Questions regarding life threatening diseases of family members and longevity of family members are certainly relevant questions to assist in estimating the pre-injury life expectancy of the plaintiff.

Actuaries and physicians working with Life Insurance Companies are an excellent source of expert evidence to provide estimates of a plaintiff's pre-injury reduced life expectancy, based on the family's medical history and relevant familial evidence.

The post-injury life expectancy is also extremely important to the determination of damages. Many studies and statistics are available to establish impaired life expectancies for persons with acquired brain injuries and compromised neurologic function such as para and quadriplegia. Three of the most common causes of death which are related to persons with reduced mobility functions, include respiratory infections, bladder infections and skin breakdown or pressure sores, all of which can lead to sepsis.
Evidence which establishes the probability of a reduced life expectancy, either pre or post injury, will be relevant in assessing damages for both future loss of earnings and future care costs.

In the *Crawford* case, the plaintiff's experts opined that Melissa Crawford would live to the age range of fifty-seven to sixty-two years. The defendant's expert produced evidence to justify a total life span of forty years. Mr. Justice Powers made a finding that Melissa would live until age fifty-four years.

The swing factor between the estimates of life expectancy between the high end of the plaintiff's experts of sixty-two years and the forty-five years as a life span which was provided by the defendant's expert, amounts to millions of dollars in future care costs and future loss of earnings.

Since future care costs are often the largest component of the damages award, the issue of the injured plaintiff's life expectancy is an extremely important factor for the court to consider.

Evidence on this critical issue, can be tendered by a variety of witnesses including: physicians who routinely care for patients with cerebral palsy (which may include physiatrists, neurologists and pediatricians); physicians who perform advisory roles to life insurance companies; actuaries; and bio-statisticians.

There are basically two approaches to the life expectancy issue: the statistical based model or the clinician based model.

The statistical approach is based on the premise that no one is capable of accurately predicting the left expectancy of a severely compromised child due to the multitude of contingent factors that can affect the child’s life. Therefore, it is argued, the most objective and reliable methodology would be to rely on the scientific probabilities derived from the statistical analysis of persons with similar medical conditions. IN the U.S.A. there are numerous statistical studies on the issue of life expectancy by such notable authors as David Strauss, Richard Eyman and Audrius Plioplys. In Canada, Dr. Geisler and Dr. Frankel have written extensively on this topic.
A good reference for defence lawyers is an article by Strauss and Shavell, “Doctors are Not Experts on Life Expectancy” (1998) www.lifeexpectancy.com/articles.

In September 2006 a new study was announced through the University of California, Davis Health System, funded by the National Institutes of Health, which will link three California databases involving more than five million births (1991 – 2003) with a fourth California database containing the records of all children who have received Medi-Cal funded services for cerebral palsy or other developmental disabilities.

This will be the largest population-based study of its kind in the United States. The reference for the UC Davis Centre for Perinatal Medicine and Law is www.ucdavis.edu/obgyn/education/perinatalaw.html.

The clinical approach addresses the individual medical condition of the plaintiff based on the physician’s experience, but of necessity, this approach must also rely upon statistical evidence to some extent.

Some of the relevant factors for determining life expectancy of a compromised child would include: age of child at the time of injury; for spinal cord injury, whether the damage is complete or partial, mobility, including ability to rollover, crawl or walk; ability to feed independently and whether oral intake can be tolerated and whether oral intake can be tolerated or whether a G-tube is required; level of cognitive ability; seizures; and availability and extent of attendant care.

**NON-PECUNIARY GENERAL (NPG) DAMAGES**

This head of damages is awarded in relation to non-economic losses which include pain and suffering, loss of enjoyment of life, loss of amenities of life and loss of life expectancy. The 1978 trilogy of cases\(^3\) held that the sum of $100,000 should be adopted as the appropriate award for all non-pecuniary losses and that it should be a Canadian conventional award. This award has been adjusted upwards to offset the impact of inflation.

As with other physical injury claims, obstetrical malpractice actions are subject to the Andrews cap on NPG awards, which was in the neighbourhood of $280,000, after adjusting for inflation at the time of the recent Crawford decision\(^4\), and is presently in the range of $310,000.

There have been exceptional cases which have exceeded the conventional upper limit for non-pecuniary general damages, based on the judicial rationale that the severity of the injuries and the pain suffered, exceeded those suffered in the trilogy:

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\text{Kennedy v. The Waterloo County Board of Education, (1999) O.R. (3d)1 - $400,000;} \]

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\text{Fenn v. City of Peterborough (1979), 25 O.R. (2d) 399 - $125,000} \]

**Guarding against double-compensation**

\(i)\) \textit{The Principle}

Awarding damages to provide “solace” flows from a functional approach to awarding damages, consisting of substituting other enjoyments and pleasures for those that have been lost, to make life more endurable\(^5\). As stated in the Supreme Court's decision in Andrews v. Grand & Toy Alberta Ltd.\(^6\), “Money is awarded because it will serve a useful function in making up for what has been lost”. The award does not flow from the loss itself.

In 1996, at page 5 of their report, the United Kingdom's Law Commission summarized Canada's functional approach to the award of non-pecuniary general damages as follows:

“damages for non-pecuniary loss are meant to provide comfort and solace to the claimant, by enabling him or her to obtain other means of satisfaction to replace what has been lost”.

The Court in Lindal quotes the following passage from the Andrews decision at p. 262:

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4 Crawford, supra at para. 282.
“...But the money [in an NPG award] is not then a recompense for a loss of something having a money value. It is given as some consolation or solace for the distress that is the consequence of a loss on which no monetary value can be put.”

The Court in *Lindal* goes on to state that:

“Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the “need for solace will not necessarily correlate with the seriousness of the injury” (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a “tariff”. An award will vary in each case “to meet the specific circumstances of the individual case” (Thornton at p. 284 of S.C.R.) [emphasis added].

ii) Application of the Principle

In cases where a Plaintiff's counsel presents evidence which can be interpreted to suggest that the Plaintiff would have incurred significant amenity expenses but for the injury then it may be arguable that the amenity expenses that the Plaintiff will now incur for solace represents a decrease in cost. For example, if evidence is presented that the Plaintiff might have gone on to become a well-paid professional then evidence might be led by the Defence about the amenity expenses that well-paid professionals normally incur (ie: expensive trips, golf and tennis memberships, luxury cars, etc.), this could then be contrasted against the expense of amenities that could provide solace to the Plaintiff in their injured condition such as music or television.

Given that the cost of the former may be greater than the latter, then an award of non-pecuniary general damages would amount to double-compensation where an award for loss of
income has been made (unless a deduction is made from the income award, for the cost of amenities that the person would have incurred regardless).

Indeed, an amenity calculus might often lead to a negative number that would have to be deducted from an income loss award. The essence of the argument is that the amenities required for solace should be reduced to take into account the monetary amount for amenities that would have been incurred regardless of the injury.

This reasoning is supported by the decision in *Lindal*, where the Supreme Court of Canada stated:

“A second factor that must be considered is that we have already fully compensated the plaintiff for his loss of future earnings. Had he not been injured, a certain portion of these earnings would have been available for amenities.

Logically, therefore, even before we award damages under the head of non-pecuniary loss, the plaintiff has certain funds at his disposal which can be used to provide a substitute for lost amenities. This consideration indicates that a moderate award for non-pecuniary damages is justified.

A third factor is that damages for non-pecuniary loss are not really ‘compensatory’. The purpose of making the award is to substitute other amenities for those that have been lost, not to compensate for the loss of something with a money value. Since the primary function of the law of damages is compensation, it is reasonable that awards for non-pecuniary loss, which do not fulfill this function, should be moderate.”

Depending upon the types of future care items that have been claimed for, there may be an argument that solace is provided by those as well. The future care items suggested should be closely scrutinized by defence counsel.

**Guarding against paying for portions of NPG claims that are not justified**

In cases where “Injury A” renders a Plaintiff unable to appreciate pains or deficits from “Injury B” it is arguable that the pains from “Injury B” cannot be said to be causing a loss of
enjoyment of life or causing the Plaintiff to suffer since he or she does not experience it. For instance, a Plaintiff that suffers a brain injury that renders the person unable to appreciate functional deficits.

Where a Plaintiff's cognitive injuries render him or her unable to understand or appreciate that he or she cannot enjoy the amenities of life, the Plaintiff arguably does not experience a “loss” that requires solace, since there is no appreciation of the loss and an NPG award may be altogether unwarranted. 7

If the Plaintiff suffers injuries of a type that little or nothing can be done to make their life more bearable then the functional utility of awarding NPG damages is questionable. For instance, in Khan v. Salama 8 Justice Holland awarded non-pecuniary general damages of $10,000 where the Plaintiff was in a vegetative state, unresponsive to any visual stimuli and making no voluntary or purposeful movements. It was found that the Plaintiff had no understanding of the state that she was in or the injuries that she had suffered. The amount awarded would likely have been $0, but for the fact that there was evidence of a possibility of a slight recovery in the Plaintiff's condition.

Similarly, in Knutson v. Farr 9, the Plaintiff suffered a brain stem injury in a motor vehicle accident and the NPG quantum was in dispute. The medical evidence that was accepted by the Court established that the Plaintiff would remain unaware of his surroundings and insensitive to pain and suffering, although fresh evidence established that the Plaintiff had developed a meagre degree of awareness of his environment. The trial judge's assessment of half of the NPG cap was overturned on appeal and the Plaintiff was ultimately awarded $15,000. The Court cited the fact that there was only a slight possibility that the Plaintiff's level of awareness would increase to the point where money would be of solace to him.

In Marchand 10, Justice Granger dealt with a case where it was, “difficult to imagine injuries to a person which could exceed or be more devastating than the injuries suffered by [the

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7 Cooper-Stephenson, infra at p. 502-3
Plaintiff]. [The Plaintiff] suffered perinatal asphyxia, which produced hypoxic ischemia, encephalopathy with severe neurological sequella. He has spastic quadri paresis (a severe form of cerebral palsy), severe to profound cognitive delay (mental retardation) and a seizure disorder (epilepsy). There is no doubt that [the Plaintiff] has a marked visual impairment, with optic nerve atrophy".\textsuperscript{11} It was found that the Plaintiff was unable to achieve any significant level of cognition or awareness. However, Justice Granger awarded the Plaintiff $50,000\textsuperscript{12} for non-pecuniary general damages apparently on the basis that “there is every possibility that some [medical] development might arise that would improve her condition to some extent”.\textsuperscript{13}

Other cases involving modest awards based on a significantly reduced level of awareness include:


A consideration that is relatively unique to injuries in obstetrical actions is that, if the Plaintiff has been rendered unable to do something in the future, he or she likely never did it in the past either. For instance, if a baby is born blind they would have never had the ability to see in the past. It may be arguable that, generally, those who have had something and have had to adjust their lives because of its loss will miss it more dearly than those who never have. Generally, the former may require more "solace" than the latter.

A final consideration relates to those cases where the Plaintiff has a significantly shortened life expectancy. If the Plaintiff's life expectancy is significantly shortened, then this ought to be taken into consideration in determining what monetary amount is really necessary to provide the Plaintiff with solace during that limited time period.

\begin{itemize}
\item \textsuperscript{11} \textit{Ibid} at para. 541.
\item \textsuperscript{12} It should be noted that the Defendants were not found to be liable in this case.
\item \textsuperscript{13} \textit{Ibid} at para. 560. The same quantum was awarded in \textit{Holder (Litigation Guardian) v. Greater Niagara General Hospital} [1997] O.J. No. 6354, affrm'd [1999] O.J. No. 4129 (Ont. C.A.) where there was evidence that the Plaintiff reacted to sounds and enjoyed being touched and stroked. It should be noted that the Defendants were not found liable in \textit{Holder}.
\end{itemize}
LOSS OF FUTURE EARNINGS

Generally

Establishing the loss of future earnings in obstetrical malpractice cases is especially difficult because of the lack of any personal, educational, employment or other direct history upon which to base it. One approach is to look to occupations held by family members, or the level of education of family members and to apply statistics to establish potential future earnings. The socio-economic position of the family members, although not conclusive, may provide some guidance as to the direction the plaintiff may have followed, but for the unfortunate injury.

In the alternative, more general statistics provide information about the average Canadian income broken down by geographic location. The breakdown by geographic location is important, since average incomes will differ based on location. The possibility of a reduced life expectancy or a reduced working life expectancy caused by plant closures, lay-offs, or other periods of unemployment must be taken into account.

The “Lost Years” Principle

A contentious area within this heading of damages is the treatment of the “lost years doctrine”. Loss of income normally deals with income which cannot be earned during the course of the Plaintiff's life due to injuries sustained in the accident. The “lost years doctrine” deals with cases where the post-accident life expectancy is reduced by the injuries sustained. The question in those situations is whether the award should compensate for loss of income up to the time that the Plaintiff's reduced life-time expires, or up until the time that the Plaintiff would have lived and worked if the accident had not occurred. The years that fall in the gap between those two make up the “lost years”.

In Andrews, the Supreme Court of Canada held that the pre-accident working life should be used in calculating loss of future income. In Toneguzzo-Norvell v. Burnaby Hospital14, a unanimous Supreme Court of Canada held that for the period between the Court's

determination of the Plaintiff's life expectancy and the determination of the age of retirement, the
calculation of loss of income requires a deduction for the Plaintiff's personal living expenses.
McLachlin J., for the Court, stated that this was justified by 'logical and functional
considerations'.

Decisions have proven that there is little consistency in the deductions that are applied.
In Toneguzzo\textsuperscript{15} the Supreme Court applied a 50% deduction for living expenses\textsuperscript{16}. In Dube v. Denlon\textsuperscript{17} Justice Zuber applied a 33% deduction. In the recent Crawford case, Justice Power applied a 30% deduction. In Kenyeres v. Cullimore\textsuperscript{18} Philip J. applied a 10% deduction. In Granger\textsuperscript{19} the Court considered it appropriate to deduct 70%. In Marchand\textsuperscript{20} the Court determined that an 85% reduction of the present value of the Plaintiff's lost income was appropriate - after deductions for contingencies had been taken into account. The decisions in Marchand and Granger both took into account the difficulty that the Plaintiff would have had in saving money in their income bracket (which was low)\textsuperscript{21}. As can be seen there is a wide variance in the amount of the reduction applied. The amount of the reduction must be considered based upon the individual evidence in each case.\textsuperscript{22} There is no rule of law that stipulates the amount of the deduction. It should also be highlighted that both the Marchand and Granger decisions held that income tax is a properly deductible living expense.

A number of Judges have expressed “misgivings” about making any award at all for the lost years.\textsuperscript{23} The logic of an award for a loss during the lost years is arguably questionable and out-of-line with the concepts of \textit{restitutio in integrum} and full but fair compensation for pecuniary

\textsuperscript{15}Ibid.
\textsuperscript{16}A 50% deduction was also applied in Chow (Litigation Guardian) v. Wellesley Hospital [1999] O.J. No. 279 at para. 276.
\textsuperscript{17}(1994), 21 C.C.L.T. (2d) 268 (Ont. Ct. Gen. Div.).
\textsuperscript{18}[1992] O.J. No. 540, (Ont. Gen. Div.), an appeal of an unspecified issue(s) had been commenced by the Defendants in this case, but was settled prior to being heard, see [1994] O.J. No. 3803.
\textsuperscript{19}Granger, supra.
\textsuperscript{20}Marchand, supra.
\textsuperscript{21}This reasoning was also accepted in Osborne (Litigation Guardian) v. Bruce County [1999] O.J. No. 50 at para. 82.
\textsuperscript{23}Marchand, supra at para. 597; Granger, supra at p. 103-4.
claims. The principle of *restitutio in integrum* is well described by an excerpt from Lord Blackburn's reasons in *Livingstone v. Rawyards Coal Co.*\(^{24}\) as follows:

“...in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

The Court in *Andrews* justified making a loss of income award during the lost years by approaching the loss not as a loss of earnings, but as a loss of the capital asset of earning capacity. Since the Plaintiff had the capital asset of earning capacity that had now been taken from him then that could be compensated for. Paradoxically, the same Plaintiff would not appear to be able to recover for the loss of the capital asset of housekeeping and homemaking capacity. Further, the deceased individual's estate is not entitled to make a claim for the losses of the capital asset, despite the fact that both are essentially awards for posthumous income loss. These disparities do not seem reconcilable.

It is notable that the law in Ontario is that the estate of a person who dies in an accident, that is, whose capital earning capacity asset is reduced to nil, is not entitled to bring a claim to recover “lost years” income\(^{25}\). After considering the former, consider the logic of an infant who is brain injured at birth with 10 years to live who could receive an award for all of the lost income that would have been made during the child's pre-injury lifetime.

There is no conceivable way that the award to the plaintiff could be viewed as putting the child back into the same economic position but for the injury. The Plaintiff's estate could end up with 40 years or so of income loss which would not benefit the plaintiff whatsoever.

In his treatise, *The Law of Damages*\(^{26}\), Professor Waddams states:

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\(^{24}\) (1880), 5 App. Cas 25 (H.L.) at 39.

\(^{25}\) Marchand, *supra* at para. 586.

\(^{26}\) 2nd ed. (Toronto: Canada Law Book Inc.) at p. 3-48.
“Where it is clear that the plaintiff will not have dependants, for example, because life expectancy is very short indeed or because of permanent unconsciousness, the proper approach would seem to be to calculate what the plaintiff would probably have spent on personal needs had the plaintiff lived out pre-accident life expectancy as a single person. In that case, the portion of income available for dependants would go to increase personal living expenses and savings, mostly the former. Only the probable savings will therefore be recoverable. It will be seen that this approach will lead to very moderate awards where person without dependants, such as a child, is deprived of the expectation of life.”

The logical justification for these awards becomes even more difficult to follow when you consider the Supreme Court's discussions of the issue. In *Toneguzzo*, the Supreme Court justified making a deduction for personal living expenses during the lost years. One of the bases of that justification was the argument that an award for loss of earnings during the lost years would only serve to enrich the Plaintiff's heirs and would do little to improve the Plaintiff's life. Justice McLachlin then went on to characterize as persuasive the following argument in Cooper-Stephenson's *Personal Injury Damages in Canada* text:

“the amount by which heirs can ordinarily expect to be enriched by a victim's putative earnings is small indeed: ... the award of damages to a very young child for prospective loss of earnings during the lost years should reflect only that portion of the entire lifetime earnings which the court estimates would have been saved by the child for his estate, at the end of his pre-accident life expectancy. It may result in a very small award.”

Acknowledging the above, while still making an award, also seems to run contrary to our practice of disallowing income loss during the “lost years” to an estate or a family that sues after a fatal accident or event.

The reasoning in *Toneguzzo* appears to represent an acknowledgment of the above-noted point that the lost years are more properly addressed, at least in Ontario, under Ontario's *Family Law Act*. 
Gender Issues

Gender is an important potential contingency, but remains a contentious battleground.

A series of judgements in the 1990's accepted the use of average earning statistics for males as the basis for estimating the future earnings of young females. It has been suggested that forecasts of young women's wages should be based on forecasts of male wages based on the assumption that the male/female wage gap will soon disappear. Authors have stated that discrimination has declined sufficiently and that it can now be anticipated that if men and women enter the same occupation and work the same number of hours, they will earn the same income\textsuperscript{27}.

In \textit{Gray v. Macklin}\textsuperscript{28}, Justice Shaughnessy held that wage parity would occur sometime in the future and thus he was justified in using male wage tables to assess the loss of income for the female Plaintiff. However, he applied a 10\% negative contingency to account for the possibility that wage parity had not been achieved and might not be achieved for several more years. He went on to state: “I am mindful that it is inappropriate for an assessment of damages to reflect historic wage inequities. The courts must ensure as much as possible that appropriate weight is given to societal trends in the labour market in order that the future loss of income properly reflects future circumstances.”

In a recent case, \textit{Walker v. Ritchie}\textsuperscript{29}, Mr. Justice Brockenshire held that separate wage tables for males and females should not be used. Instead, he endorsed gender-neutral wage loss tables. “In my view, he wrote, “the use of statistical figures which reflect the entire population, without division as to gender...avoids the problem of having two separate tables and then having to choose between them and apply what seems like appropriate adjustments”.

A defendant might argue that although a female has the potential to earn the same as a male counterpart, the practical realities may often lead to a different result. A defendant may tender the evidence of a sociologist or offer statistical evidence that many women will sustain a diminution of earnings over the course of their lives, by taking time away from work for maternity.

\textsuperscript{29} [2003] O.J. No. 18 (Ont. S.C.J.).
leave or to stay home with young children and will likely engage in some form of part-time employment over the course of their life.\textsuperscript{30}

Further, many of the traditional homemaking and childcare responsibilities are still primarily performed by women. As a result, many of the women who assume these obligations, may seek employment that is compatible to their lifestyle, or even part-time employment, rather than pursuing a more demanding, higher-paying career.

There are certainly exceptional individuals who are able to excel in their chosen occupation as well as balancing family and care giving responsibilities, but there is statistical evidence available to suggest that this is not the norm.

For example, although female physicians are capable of earning the same as their male counterparts, the statistical facts indicate that many will earn substantially less money because many women doctors choose to work less hours or even work on a part-time basis.

Similarly in the legal profession, there are statistics available from the Law Society of Upper Canada about the number of female lawyers who are attracted to salaried 9 - 5 positions, or to part-time employment, or those who abandon the profession entirely.

There are also interesting statistics which can be used by the defence to reduce future loss of income claims in certain occupations which are traditionally occupied by females. For example, there are a substantial number of dental hygienists who typically work a three or four day week. Although many recent graduates will begin working a five day week, many will reduce their hours of work as they get older.

The gender issue as it relates to future loss of earning is still a topic of judicial debate and therefore a diligent lawyer will fully explore all relevant evidence which may be relevant for this head of damages.

\textsuperscript{30} These contingencies were accepted by Justice Power in the \textit{Crawford} decision at para. 296.
Negative Contingencies

A persuasive defence theory always embraces the negative contingency concept. Jury members live in the real world where there are daily disappointments and where many people struggle financially when unexpected events occur.

It is relatively easy to convince a jury that the plaintiff's loss of future income claim is based on a 'fairy tale' projection that the plaintiff would have “lived happily ever after” if only the defendant's act of negligence had not occurred. Jury members know that life isn't like that. Life is a roller coaster ride punctuated with highs and lows. It is a bitter-sweet experience which is rife with risks and unforeseen disappointments, as well as with joyous moments of warmth and laughter. In real life there are economic downturns, plant closures, unemployment, strikes, 911 disasters, wars, investment losses (Nortel, tech stocks, income trust taxation), unexpected illness or injury, bankruptcy, unwanted pregnancies, divorce and many other challenges which affect many people who live in the real world.

It is not uncommon for juries to reduce a plaintiff's theoretical model for loss of future income, based on the hard realities of life.

A plaintiff’s lawyer will attempt to minimize the negative contingency approach and stress positive contingencies which may have improved the plaintiff’s financial position.

Age of Retirement

Retirement is another important contingency. Statistics Canada has information setting out the average age for retirement by occupation. Although this is not determinative of when a particular Plaintiff may have retired but for the injury, it is often persuasive. The fact that the percentage of people that work to age 65 is declining must be taken into account. This trend could be commented upon by economists and sociologists.

The plaintiff's theoretical approach is often based on the presumption that the plaintiff would work until age 65. The era of a gold watch and a retirement party at age 65 is a nostalgic memory.
Economists can provide statistical evidence as to the average age of retirement based upon occupation. The information is readily available through Stats Canada. Although this evidence is not determinative as to when a particular plaintiff may have retired, it is often persuasive. It seems that very few people today (with the exception of judges and lawyers) continue working to age 65 or beyond, whereas a few decades ago, it was the norm.

Plaintiff’s lawyers may now be arguing for a longer working life span in certain cases since age related mandatory retirement was prohibited by legislation in 2006.

**FUTURE CARE COSTS**

These damages are assessed according to “the reasonable or normal expectations” of what the Plaintiff will require.\(^{31}\)

A preliminary issue that arises in many cases is whether the Plaintiff ought to be cared for at home or in a private or public institution. This single decision can have massive cost implications for both parties. Home care often costs significantly more than institutional care, and institutional care may be entirely or partially funded by the state and therefore may limit recovery in the action.\(^{32}\)

The Supreme Court's decision in *Andrews*, held that a Plaintiff may be entitled to home care despite its higher costs, depending on whether the facts suggest that home care is the most physically and emotionally satisfactory option. For instance, if it is not possible to provide proper care in a home environment and institutional care is a sounder medical choice.

Even if home care is the immediate choice, it may not be the proper choice forever. For instance, in *McErlean v. Sarel*\(^{33}\) the Court's decision was that the most appropriate option was 20 years of home care followed by institutional care.

In *Thornton (supra)* a 20% contingency deduction was applied to the cost of home care. A similar result was reached in *Marchand (supra)*.

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\(^{32}\) *Cooper-Stephenson*, supra at 421.

\(^{33}\) (1987), 42 D.L.R. (4th) 577 at 606-10 (Ont. C.A.) [hereinafter “McErlean”].
It must be remembered that it is the Defence's obligation to provide evidence of alternatives to home care and their costs. If the Defence fails to do so, the Court will not conjure up its own alternatives.\textsuperscript{34}

It is also often prudent for Defence Counsel to ask their experts to comment on contingencies that may have the effect of reducing future care cost awards. For instance, even where future home care assistance, or the full amount claimed, is likely required but not certain, a deduction should be made to reflect the possibility that it will not be required. Experts should also take into account the need for intermittent institutional care, etc. to reduce the cost of the home care over time.\textsuperscript{35} If frequent hospitalization is likely over the course of the Plaintiff's life, then a deduction for intermittent institutional care has the potential to translate into a significant cost-savings. While the amount of the deduction will be tied to the particular circumstances of the given case, in \textit{McErlean} the Court of Appeal deducted 15\% (translating into a costs savings of approximately $290,000 in the mid-1980's case). In \textit{Crawford}, Justice Power fixed the contingency at 5\%. Once again, the contingency will vary depending upon the particular fact-set.

Plaintiff's counsel may argue that health care costs are escalating at a higher rate than the consumer price index and, therefore, a higher discount rate is warranted. The Plaintiff's lawyer would likely retain an economist to buttress that argument. Defence Counsels should challenge that evidence with evidence from their own economist.

Future Care Cost Reports always generate controversy with respect to what is truly necessary. For example, a future care cost report may provide the expense of two wheelchairs so a spare chair is available if the primary chair is being repaired. The same report may forecast the number of years that the chair will last before replacement is necessary. However, if two chairs are purchased and the user alternates between the two, then it could be argued that the estimated life of the chairs can be doubled. Alternatively, it could be argued that the purchase of a second chair is altogether unnecessary, since a chair could simply be rented on

\textsuperscript{34} Cooper-Stephenson, supra at p. 425.
\textsuperscript{35} McErlean, supra; Crawford, supra.
the few occasions that the primary chair is unavailable. Either approach could represent a significant reduction in costs.

The defendant should retain an occupational therapist to prepare a Life Care Plan for the plaintiff. This plan should be endorsed by the physiatrist who conducts the plaintiff's independent medical examination. The plan should scrutinize the plaintiff's requirements for housing, transportation, education, employment, attendant care, therapists, assistive devices, financial advisors and handyman services. It should also critique the plaintiff's future care cost report.

A person's needs are contingent on their lifestyle and accommodation. For example, a plaintiff living in a condominium with an enclosed parking garage, will probably require a minimum of 'handyman' expenses for home maintenance.

Many paraplegics and incomplete quads can operate their own vehicle with the modification of hand controls. An expensive conversion van with wheelchair lift may not be required, instead a minivan with lowered floor may be more practical.

The defendant should provide evidence as to the probable costs that the plaintiff would have incurred for housing, transportation and handyman services even if the injury had not occurred. It is only the additional expenses for which the defendant ought to be liable. If the plaintiff cannot operate a car without an automatic transmission, power windows and a cell phone for emergencies, then consideration should be given as to whether the uninjured plaintiff would have had an automatic transmission, power windows and cell phone in any event.

Similarly with respect to housing costs, the plaintiff would have required some place to live regardless as to whether the accident occurred, so the defendant's theory of damage should be to advocate responsibility only for the additional renovations to accommodate the plaintiff's disability.

Rehabilitation caseworkers should be focussed on teaching the injured plaintiff methods to achieve independence in activities of daily living, which will reduce attendant care costs.

The hourly rate of attendant care workers should be shopped by the defendant's experts, particularly when the level of skill required by the care worker is minimal. There may be
available care givers who are prepared to work for far less than the plaintiff's cost projections. Further, if extensive care is being offered, then care workers may provide their services at a lower rate than would otherwise be the case.

Moreover, the determination of the rate of pay should not be assessed by looking to the rates charged by a company. A company's rates will normally be higher than the rates charged by independent caregivers. The injured party receives the same care, and would not derive benefit from the extra amount charged by company's (which is used for admin., marketing and profit). The injured party would arguably be better served by hiring independent caregivers to ensure a more personal and a better level of care, as opposed to a company where caregivers may come and go, and, as company employees, may not have the same interest in providing personalized and exceptional client service as a self-employed independent provider would. If the caregivers were paid directly by the injured party, then they would probably even receive a higher rate of pay then they would if the injured party paid a caregiver company who then paid its employees an hourly wage.

The extent of future physio or psychological treatment should be carefully reviewed by appropriate experts. It is common to see expensive future projections but in reality, persons can learn to perform exercise regimes that are as beneficial as physio, subject to occasional monitoring. Psychological counselling may be necessary initially, but the goal should be to accept the reality of the disability and learn to try to overcome the depression and frustration that inevitably accompanies a catastrophic injury. The benefit and frequency of any such future therapy is subject to debate.

**COLLATERAL BENEFITS**

Government sponsored assistive device programs as well as the availability of reimbursement through private health-care, disability plans and other collateral benefits ought to be fully explored given the potentially significant costs savings that can be realized.

Defence Counsel must be diligent in determining the nature and extent of benefits which may be available to the injured party. It is often advisable to retain an expert who can provide advice as to the type of municipal, provincial and federal grants or subsidies which the plaintiff may be qualified to receive for assistive devices, attendant care or rehabilitation and retraining.
initiatives. Provided that there is no right of subrogation, these government programs may amount to substantial savings for both special damages and future care costs. Some cases have awarded a 50% deduction for services paid by ADP (Holder, Dube, both Supra); and other cases have not made any deduction based on the uncertainty of the continuation of the program.

Stein v. Sandwich West, [1993] O.J. No. 423 (C.A.);


Insurance benefits through an employer or private plan may also be available to reduce the defendant’s exposure for damages although the issue of the deductibility of these collateral benefits may be an issue for argument. In support of the plaintiff’s position that these benefits are not deductible is:


Canada Pension Plan Disability Pension payments should certainly be the subject of inquiry at the discovery. An assignment of these benefits should be sought by the defendant. If the Plaintiff is not actively seeking these benefits before trial, then an argument should be advanced that the plaintiff has failed to mitigate.

An astute plaintiff’s lawyer will rely on a strong line of cases which refute the argument that C.P.P. disability benefits are to be deducted from damages:


DISCOUNT RATE

The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment return and price inflation rates is found in Rule 53.09(1).
For trials in 2007, the discount rate for the 15 year period that follows the start of the trial is 0.75%.

The discount rate is 2.5% for any period in excess of 15 years.

**GROSS UP AND PERIODIC PAYMENTS**

A substantial savings can be realized by avoiding payment of 'gross-up' for income taxation. This can be achieved by implementing a structured judgment pursuant to s.116 of the Courts of Justice Act.

If ‘gross-up’ is to be applied to off-set the impact of income taxation, then the formula for calculating the amount to be included in the award is found in Rule 53.09(2).

The appropriate procedure to be followed to determine whether a structure is practicable in the particular circumstances of the plaintiff's case was reviewed by the Ontario Court of Appeal in *Roberts v. Morana*\(^{36}\), and commented on as follows:

1. Damages are assessed;
2. Plaintiff elects whether to request a gross-up;
3. Defendant concurs or submits a proposed structure;
4. Plaintiff bears the onus of showing a proposal that is better than the structure;
5. The court decides what is in the plaintiff's best interests.

It is advisable for a defendant to consider a double reversionary interest as part of the structured settlement annuity so that the defendant recoups part of the damages in the event of the plaintiff's premature demise before the end of the guarantee period.

Ontario’s government has recently proposed an initiative\(^{37}\) that would effectively eliminate gross-up from future care-cost awards in medical malpractice actions.


\(^{37}\)
On October 19, 2006, the Ontario Legislature enacted the Access to Justice Act, 2006, which adds section 116.1 after section 116 of the Courts of Justice Act. This new section mandates structured settlements in medical malpractice cases where the plaintiff is awarded future care costs in excess of $250,000, if a request is made by either party.

The amount and frequency of the tax-free payments made under the annuity contract are to be determined without regard to inflation, however there are requirements that the payments be indexed for inflation, “to a degree reasonably available in the market for such annuities”.

The structured settlement plan must be filed with the Court within 30 days of the judgment or within another period that the court may specify. Otherwise, the court shall , at the request of either party, vacate the plan and substitute a lump sum aware with a gross-up to offset liability for income tax on income from investment of the award.

If the plaintiff is able to satisfy the court that a periodic payment is unjust, having regard to the capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to compensate, then the court may order a whole or partial lump sum payment.

The implementation of these measures could represent a significant cost-savings to Defendants in obstetrical malpractice cases.

Plaintiff’s lawyers ought to be wary of the hidden costs associated with assignments of structured settlement annuities. It is not simply the few thousand dollars for the assignment fees. The real cost is in the lower annuity payment rates as compared to a non-assigned annuity. A comparative rate analysis should be undertaken before agreeing to an assignment.

**LOSS OF OPPORTUNITY FOR AN INTERDEPENDENT RELATIONSHIP**

This head of damages provides compensation where a Plaintiff’s injuries compromise their ability to form an interdependent relationship with another person. The development of this

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37 "Income Tax Gross-Up & Periodic Payment Damages Awards in Medical Malpractice Cases: A call for Legislative Reform"
38 S.O. 2006, Chapter 21 (formerly Bill 14), Appendix “A”, s. 17
heading is still in its relative infancy and while the skeletal structure of the claim is in place, further judicial consideration will be necessary to fully define it.

In order to succeed in establishing an LOIR claim, a Plaintiff must adduce evidence that there is a loss or an impingement of an ability to form an interdependent relationship and that the relationship would have been economically advantageous.\(^39\)

It is important to remember that the law does not recognize that an economic loss will result from a diminished opportunity to form an independent relationship with another person, only that it may do so.\(^40\) The determination of whether such a relationship was in fact lost, and the determination of whether anything that may have been lost would have been economically advantageous, requires an evidentiary assessment, not a jurisprudential comparison.\(^41\) The Plaintiff bears the burden of proof and mere speculation is not sufficient: evidence of the alleged loss must be tendered.\(^42\)

Claims under this heading have most often been made by those with devastatingly serious injuries. It has been posited that many non-catastrophic injuries could theoretically lead to an LOIR award.\(^43\) However, the tendency of case-law to reserve the award to the most devastating injuries has been discussed by British Columbia’s Honourable Justice Harvey as follows:

“In the decisions of our courts to date, where such an award has been made, the plaintiff’s injuries have been described as catastrophic, near catastrophic or horrendous. They have commonly included paraplegia, quadriplegia and brain

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41 Ibid.
43 Powell & White, supra at p. 7.
44 See also Latta v. Ontario, supra at para. 162.
damage, such as to warrant concluding there was no prospect of marriage or a similar permanent relationship with another person. 45

Claims under this heading have generally been restricted to females, and, indeed, as of March 2004 no male Plaintiff had ever clearly received an award under this heading. 46 That being said, there is no explicit bar to male Plaintiffs making the claim. In Bartosek v. Turrett Realities 47 a 6 year-old male Plaintiff was severely brain damaged after being hit by an automobile while he was riding his bicycle. The Court acknowledged that the area grew out of the fact that women's wages were lower than mens, but did not dismiss the claim because the Plaintiff was a male. Instead it dismissed the claim because the damages were simply too remote and speculative to be assessed. Powell and White's paper opines that it is possible that the real reason that Bartosek's LOIR claim was not granted was because it was made by a male.

If one accepts that LOIR is generally relegated to females because of the historic wage discrepancy between men and women, then it is only fair to use female wage scales when calculating loss of income, and preferably wage scales of females in interdependent relationships. Defence Counsel should be sure to advance such arguments to prevent the Plaintiff being permitted to rely upon gender-based statistics that result in heightened damage awards while avoiding those statistics that lower damage awards, thus creating an unrepresentative damages picture.

There has been wide-spread inconsistency in the assessment and quantification of the damages awarded. Damages have been awarded for both pecuniary and non-pecuniary losses under LOIR. Some cases have taken LOIR into consideration under the NPG headings and

45 Nicholls v. B.C. Cancer Agency, [1999] B.C.J. No. 1475 (B.C.S.C.) at 67, where three pap smears were misread resulting in the Plaintiff undergoing extensive treatment including “painful and debilitating” radiotherapy. The Plaintiff was rendered sterile, would experience the early onset of menopause, bodily dysfunction, fatigue, and panic attacks.

46 Powell & White, supra at p. 11, but see, i.e., McKenzie v. Van-Cam Freightways [1990] B.C.J. No. 868 (B.C.S.C.) where a male Plaintiff's income loss calculation incorporated an amount for “spousal loss”.

loss of income headings, while others have considered the area under an independent heading. Care must be taken to avoid double compensation with other headings of damages.⁴⁸

If the Plaintiff is able to demonstrate that they have indeed suffered a loss under this heading then that may translate into an increased non-pecuniary award. Quite understandably, an injury that seriously impedes their ability to form an interdependent relationship may merit “solace”. However, the allegation that the loss of opportunity also merits a pecuniary award has met with resistance due, likely in most part, to the uncertainties inherent in such an analysis.

FAMILY LAW ACT CLAIMS

Legislation

In Ontario, a relative’s right to bring an action for their own losses arising out of the injury or death sustained by their relative is governed by the Family Law Act⁴⁹. The relevant provisions of the Family Law Act are as follows:

Right of dependants to sue in tort

- ⁶¹. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), same-sex partner, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25).

Damages in case of injury

(2) The damages recoverable in a claim under subsection (1) may include,

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(a) actual expenses reasonably incurred for the benefit of the person injured or killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

Contributory negligence

(3) In an action under subsection (1), the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed. R.S.O. 1990, c. F.3, s. 61 (3).


At page 7 of her paper entitled “Recent Damage Awards pursuant to the Family Law Reform Act”, Ava Hillier discusses the constituent elements of subparagraph (e) as follows:

“Guidance” includes education, training, discipline, and moral teaching

“Care” is accepted to include feeding, clothing, cleaning, transporting, helping and protecting another person;

“Companionship” is accepted by the Court as:

...deprivation of society, comfort and protection

Quantum awards will necessarily vary based upon specific fact-sets. However, there are some general principles concerning obstetrical malpractice that are worthy of discussion. In
cases involving obstetrical malpractice, the FLA claimants are normally the ones that provide the guidance and care and would not normally expect to receive it from their child. Therefore, in most cases of obstetrical malpractice, a Family Law Act claimant's loss of guidance and care should be assessed modestly.

Based on the above, one can see that, in many FLA claims arising out of obstetrical malpractice, the claim should be relegated simply to a loss of companionship. Cases have generally not separated damage awards between care, guidance and companionship, but there is little doubt that the loss of three is greater than the loss of one.

PREJUDGEMENT INTEREST

In Ontario, pre-judgment interest is governed by the provisions of Section 128 and 130 of the *Courts of Justice Act*, as well as Rule 53.10.

The pre-judgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5% per year.\textsuperscript{50}

The pre-judgment interest rate for past pecuniary loss is to be calculated on the total past pecuniary loss at the end of each six month period from the date the cause of action arose to the date of the Order.\textsuperscript{51} The pre-judgment interest rate means the bank rate, which is calculated quarterly.\textsuperscript{52}

The court is given a discretion to disallow interest, increase or lower the interest rate, or vary the period for which interest is allowed.\textsuperscript{53}

In appropriate circumstances, a court is entitled to award compound pre-judgment interest.\textsuperscript{54}

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\textsuperscript{50} Rule 53.10
\textsuperscript{51} Section 128(3) Courts of Justice Act
\textsuperscript{52} Section 127(1) Courts of Justice Act
\textsuperscript{53} Section 130 Courts of Justice Act
According to the provisions of Section 258.3(8) of the Insurance Act, no pre-judgment interest shall be awarded under Section 128 of the Courts of Justice Act for any period of time before the plaintiff served written notice of an intention to commence the action on the defendant.

Defence lawyers should argue that plaintiffs receive a double recovery if pre-judgment interest is awarded on non-pecuniary general damages at the annual rate of 5%, since an award of general damages has already been adjusted to account for inflation. Although there is precedent to award pre-judgment interest on general damages, the argument should still be vigorously presented since law is constantly evolving.  

BURDEN OF PROOF

The onus or burden of proof is on the plaintiff to establish causation of damages and to lead evidence which will form a factual foundation upon which the court can quantify the damages.

The degree of proof that is required will vary according to the nature of the damages being claimed. The plaintiff must prove on the balance of probabilities that the tortious act or omission was the effective cause of the damages. To prove a fact on the balance of probabilities, it is only necessary to prove that its occurrence was more likely than not, or, a reasonable certainty. In some cases very little affirmative evidence are required to justify an inference of causation in the absence of evidence to the contrary.

Special damages must also be proved on the balance of probabilities. In determining what did happen in the past, a court decides on the balance of probabilities. Anything that is more probable than not, it treats as certain.

58 Ibid 61
However, the balance of probabilities test is confined to what did in fact happen in the past.\textsuperscript{60} The test for future loss or damage is not the balance of probabilities, but rather whether there is a “reasonable chance” of such damage or loss occurring.\textsuperscript{61}

The “reasonable chance” test has also been described as whether there is a “real and substantial risk” of future loss or damage. Entitlement to compensation will depend in part on the degree of risk established. The greater the risk of loss, the greater will be the compensation.\textsuperscript{62} The difficulty of a damage assessment does not prevent the plaintiff from recovery and thus relieve the tortfeasor of the obligation to pay damages.\textsuperscript{63} It is not necessary to estimate damages with mathematical accuracy. The court must do the best it can to estimate the plaintiff’s damages.\textsuperscript{64}

Future contingencies which are less than probable are regarded as factors to be considered provided they are shown to be substantial and not speculative. Speculative or fanciful possibilities unsupported by cogent evidence should be ignored.\textsuperscript{65}