



Are You Ready For The Cost Of Future Care?

Are you ready?

Has the bar for tort catastrophic bodily injury claims in Canada taken a significant leap higher or does it just seem that way? Certainly, the trend over the past 18 months in the Ontario judiciary could lead one to believe the former.

During that period, the courts granted a cluster of four unusually large bodily injury awards. Very recently, one of the seminal cases, *Sandu v. Wellington Place Apartments*, received a resounding stamp of approval from the Court of Appeal.

Since the awards in these cases are largely fact driven, the appeal process is difficult and uncertain. Should any of the other cluster cases be appealed and in light of the *Sandu* decision, it seems unlikely that appeal courts will radically change the landscape.

The cluster certainly has convinced Ontario plaintiff lawyers that the bar has been raised on all similar claims. In the wake of these decisions, we have seen claimants in Ontario amend pleadings to increase damages to the \$15M/ \$20M range. Settlement expectations likewise have dramatically increased.

Whether higher catastrophic injury awards are necessarily a trend, time will tell. In the interim, insurers will have to seriously consider whether they are now facing substantially higher damage exposures for catastrophic injuries and whether their pricing is adequate for these risks.

The “Cluster”

These cases involve three brain injured claimants (*Sandu v. Wellington Place Apartments*, *Gordon v. Greig*, *Marcoccia v. Gilt*) and one quadriplegic (*Morrison v. Greig*). In each case, the plaintiff’s award was in the double digit million range.

The true driver behind the increase in these awards is the cost of Future Care — in particular the cost of 24/7, life-long attendant care.

Significantly, these cases came in quick succession, involve four different trial judges (including one in front of a jury) and, recently, a full panel of three appeal court judges. There is an appearance of consistency in the judiciary’s handling of these cases that will certainly make the defence of these cases even more challenging in the future.

If there is a trend towards higher damages arising from the cluster cases, it will likely apply for the most part, if not exclusively, to claims involving catastrophic brain injury or quadriplegia in children and young adults with long life expectancy.



MROC
Munich Re Group

Convergence of Factors

Any trend towards much higher catastrophic injury awards may just be the inevitable outcome of a convergence of numerous factors that have been developing in Ontario for some time including the following.

1) The substantial expansion of 'no fault' automobile Accident Benefits in Ontario has contributed to very large Future Care cost demands in tort catastrophic bodily injury cases through the development of a broad range of treatments, therapies, services and equipment related to quality of life issues.

2) Ontario's long history of Accident Benefits has permitted development of a broad range of expertise in all areas of health care services giving the plaintiff bar access to a wide range of and choice in experts.

3) The rate of inflation for health care services under Ontario's automobile accident benefits coverage dramatically surpasses that for the same health care services covered by Ontario's public health care system and affects the cost of such care under Accident Benefits claims as well as tort injury litigation.

4) Advances and accessibility to medical care and treatment continue to extend/improve the lives of catastrophically injured claimants, making the cost of daily living more expensive for a longer time.

5) The plaintiff bar in Ontario, more organized and skilled today, is increasingly networked. Knowledge and case building strategies of leading plaintiff counsel are more readily available to the plaintiff bar generally. The defence bar has been slower to respond in kind and some argue that by imposing very onerous cost controls on defence counsel, insurers may not be helping here.

6) Quality of life expectations of catastrophically injured claimants and society in general have grown in terms of independence, mobility, social interaction, self expression, education and careers.

7) Sympathy and compassion are factors requiring little comment. Courts are concerned that trial may be a claimants' best and only opportunity to obtain adequate compensation to pay for needed medical care and to maintain quality of life for many years. Based on projections, Future Care costs and the money required to pay them are subject to tremendous uncertainty. If there is concern as to whether a claimant will have access to enough money, a bias towards erring on the side of caution is natural and readily understood. One result of such 'erring' can be inflationary pressures on Future Care cost awards and settlements.

Self-Limiting or Far Reaching Implications

Historically there have been large catastrophic injury awards in Canada. These tended to be case specific with limited implications for bodily injury costs generally.

Two of these earlier cases (*Crawford v. Penney*, 2003; *New v. City of Moose Jaw*, 2004) yielded awards in excess of \$10M but appear to have had limited implications for subsequent catastrophic injury cases. In *Crawford*, the court was very critical of the actions of the defendants both prior to and during trial.



A critical factor in the cluster awards may be changing societal expectations relating to quality of life

Recent large Bodily Injury awards - “the cluster cases”

Date of Loss: 1997
Trial: 2005
Decision: 2006
Award - \$18,000,000 Range

Court of Appeal for Ontario
Sandu v. Wellington Place Apartments

A 26 month old male claimant fell from a 5th floor apartment building window, sustaining a closed head injury, fractures and internal injuries. The resulting bodily injury claim and derivative FLA claims were brought against the apartment building complex and its owners. The case was tried by an Ontario jury which awarded damages in the amount of \$12,936,143. Inclusive of pre-judgment interest, costs and disbursements, management fees, co-guardianship fees and post judgement interest, the total claim could reach the \$18,000,000 range. The insured was held 90% liable but under joint & several liability the plaintiff has the prerogative of seeking all damages from the building owners. In March 2008, the damages awarded at trial were upheld by the Court of Appeal.

Date of Loss: 2000
Trial: 2006
Decision: 2007
Award - \$15,500,000 Range

Ontario Superior Court of Justice
Marcoccia v. Gill

A 20 year old male claimant was injured in an Ontario automobile collision. He sustained injury to his frontal and temporal lobes and exhibits left side hemi-paresis. Claimant's counsel argued that prominent disinhibition, lack of insight, irritability and cognitive impairment leave him ill suited for a group home or assisted living conditions. Plaintiff's lawyer argued that he required 24/7 attendant care for the duration of his life and that he would never be capable of meaningful employment. These are fundamentally the same arguments used in the Sandu case and the same plaintiff counsel acted in both actions. Following a jury trial, damages were awarded in the \$15,500,000 range.

Date of Loss: 2003
Trials: 2006
Decisions: 2006 & 2007
Awards - \$11,519,525 &
\$12,606,198

Ontario Superior Court of Justice
(1) Gordon v. C. Greig
(2) Morrison v. Greig

The claimants were passengers in an Ontario automobile. The alcohol impaired driver lost control and the vehicle rolled over. Neither claimant was using seatbelt restraints. Both were thrown from the vehicle. Both male claimants were about 22 years of age. Claimant #1 was rendered a quadriplegic. Claimant #2 sustained a catastrophic brain injury. Both claimants sued the driver and the company from which the vehicle was leased. The damage award for Claimant #1 was \$12,606,198 inclusive of FLA claims. The Court award for Claimant #2 and his family was \$11,519,525. Claimants' costs are in addition to these awards. The status of any appeal is unknown at this time. The awards will be reduced by the percentage of contributory negligence on the part of each respective claimant. The reduction in either case likely will not exceed 25%. The driver's automobile tort policy limit was exhausted. The bulk of this exposure fell to the leasing company.

In Moose Jaw, the defence faced a self-accomplished and compelling claimant.

By comparison, the cluster cases do not demonstrate any particularly egregious conduct by the defendants or involve unusually sympathetic claimants. There are no obvious characteristics that suggest anything exceptional. Yet, both jury and non-jury trials produced damage awards similar to these 'exceptional' earlier awards.

A critical factor in the cluster awards may be changing societal expectations relating to quality of life for catastrophically injured parties. Do the cluster cases represent a 'best care' model to be awarded only in exceptional cases or do they represent a 'minimum' standard of care for all catastrophic injuries?

Consider the settlement of Browne v. Lavery in 2004. At the time, this was described as one of the largest personal injury settlements in Canada. Plaintiff's counsel later commented that his client would receive the best care available for the remainder of her life. Two years later, in the Gordon/Morrison cases, the court noted that the awards would permit the claimants to live with dignity.

The distinction here, if there is one, is interesting. In Lavery, the "best care available" appears to be the basis for an exceptional settlement quantum. While the quantum of the Gordon/Morrison, "living with dignity" awards might suggest a new minimum standard for similar catastrophic injuries, the cost in either case may very well be the same.

The courts in such catastrophic cases frequently express concern about ensuring that the scope and level of Future Care is appropriate and that adequate funding is in place. If the appropriate “scope and level” for what was “best care” is today “living with dignity”, then it may very well be that the amounts awarded in the cluster cases are “adequate” and no more.

Cluster Legacy

What will be the long term affect of the cluster cases on catastrophic bodily injury claims in Canada and what does it mean for Insurers?

First, all four cluster cases were decided in Ontario. At least theoretically, courts in other provinces are still free to set a different, perhaps less costly outcome in similar circumstances. We would expect however, the plaintiff bar to strongly advocate a cluster standard.

Also, although the implications of these cases are significant, the bar for tort bodily injury claims has technically only been addressed in very specific situations: catastrophic injuries to parties expected to live a long time. It would be far more dramatic and far reaching were, for example, the cap for non-pecuniary general damages removed.

Nevertheless, at a minimum, it will be extremely difficult to argue in the future that such awards can be dismissed as ‘exceptional’ and ‘extraordinary’.

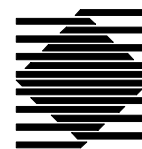
Thus, on the one hand, these developments will require insurers to step up defence efforts which means using high levels of expertise, skill and experience as well as spending more money. On the other hand and more importantly, in the aftermath of these cases, insurers should be taking a long, hard look at their pricing to ensure they are charging adequate premiums for this risk.



... developments will require insurers to step up defence efforts which means using high levels of expertise, skill and experience as well as spending more money.

As a final thought, it is nothing less than astonishing that these cases have had little or no impact on the insurance market place. It was only about 20 years ago that one Ontario “quantum leap” case, *McErlean v. Sarel* (also known as the City of Brampton case) generated a frenzy. Liability insurance costs shot through the roof and capacity was scarce. Little changed when that case was later reversed on appeal (albeit on liability). Here we have four cases, one of which has received unanimous approval from the Ontario Court of Appeal, yet the liability market continues its pricing free-fall.

Who will be the first to restore sanity?



MROC
Munich Re Group

Munich Reinsurance Company of Canada
390 Bay Street, Suite 2200
Toronto, Ontario
M5H 2Y2