

QUANTIFYING FUTURE EXPENSES (“COSTS OF CARE”) IN CONNECTION WITH PERSONAL INJURY CLAIMS; AN ACTUARY’S PERSPECTIVE

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The first presentation is May 13, 2005 in Vancouver to a meeting of the Canadian Institute of Life Care Planners.

The second presentation is May 25, 2005 to the Private Practice Workshop of the National OT Conference In Vancouver.

INTRODUCTION AND SUMMARY

In many cases where personal injury claims are made, the plaintiff’s or the defendant’s counsel (more often the plaintiff’s counsel) will obtain a report from a cost of care expert, quantifying the extra future expenses the injured party will incur as a result of his or her injuries. (“Plaintiff” means a person that was injured and has started a lawsuit, in connection with an accident usually related to motor vehicle traffic, but possibly also due to “slip and fall”, medical negligence, or other cause). Counsel may then retain an actuary or economist to determine the present value associated with these future costs.

The principal intended audience for this paper is cost of care experts, but I hope it will be of interest to actuaries, lawyers, and others involved with personal injury claims. This paper focuses on the interaction between the actuary and the cost of care expert as the actuary prepares his/her report. I am an actuary practising in B.C.; I specialize in work for lawyers (“actuarial evidence” work). I discuss, from an actuary’s point of view, what characteristics of cost of care reports best meet the actuary’s requirements for clarity and specificity. I discuss the following issues:

1. Consistency between the narrative portion of the report and the cost summary is desirable.
2. The treatment of sales taxes (GST and provincial sales tax).
3. Some costs (e.g. special shoes, particular type of mattress or bed, customized vehicle) relate to items which would be needed (though at a lesser cost) by the plaintiff, even if no injury had occurred. A similar issue (re “ordinary living expense”) arises regarding the costs associated with group homes, or care facilities for the elderly.
4. In some cases, the plaintiff’s spouse (or significant other, or child, or parent) provides

significant personal care and household services. If this person were for any reason not present, and willing and able to continue their work, costs to the plaintiff would increase.

5. If the cost of care expert mentions a range of results as appropriate to the particular plaintiff (re the amount of an expense, or the frequency of replacement), I think that the costing should be based on the midpoint of the range.

6. The cost of care expert should be as clear and specific as possible re the factors affecting the amount, duration, and frequency of each cost item. However, this does not mean that the cost of care expert need have an answer to every relevant question ; e.g. timing of joint replacement surgery, time plaintiff would have become a homeowner.

7. The cost of care expert may project that, at some future time, or under some specific set of future circumstances (e.g. following surgery) the plaintiff may need to move into a group home or care facility. The cost of care report should then enumerate which costs (otherwise ongoing for life) will no longer be required during residency in a care facility or group home.

8. I think that there should be consistency between projected restrictions at work and projected future costs of care which are intended to compensate for the plaintiff's diminished capacity to carry out household services.

9. Finally, I comment on the interaction between the lawyer (i.e. the client) and the actuary, and in particular the necessary conditions re client influence on work product that I regard as essential to maintaining my professional integrity and independence. Hopefully these comments will be of some interest to cost of care experts, in connection with their relations with their lawyer clients.

The underlying legal framework is fundamental to the work done by cost of care experts and actuaries. However, a detailed discussion of the underlying legal framework is beyond the scope of this paper. For an excellent general introduction to the law in Canada re future costs of care in personal injury cases, see Cooper - Stephenson, *Personal Injury Damages In Canada*, 1996 Carswell; pp. 164 - 200 and 409 - 455.

Based on past experience and case law analysis, I normally suggest to counsel that, whenever possible, counsel should have the cost of care report reviewed by medical experts, to ensure that the medical experts agree with the cost of care recommendations. Cost of care experts can consider making similar suggestions to counsel.

1. Consistency Between Narrative Portion And Cost Summary

Almost all cost of care reports have a narrative portion describing costs, frequency and future replacement times in detail, and then a cost summary towards the end of the report. It is important to ensure consistency between the two sections. Similarly, if the cost of care report identifies a general area of need, but then no specific costs are given, the resulting apparent inconsistency should be corrected or explained.

An alternative to having a cost summary at the end is simply to include all relevant details in the narrative section, for each item separately. This saves the need for the actuary to compare the two sections. The actuary does not need a final grand total from the cost of care expert for one - time costs and annual costs, since the actuary deals with each cost item separately, reflect the specific timing of each item. However, some lawyers may want these numbers. If such final grand totals are quoted, cost of care experts should point out that annual costs may start and end at different future times, and that the timing of one - time costs may vary. This will alert the reader that an accurate costing requires item - by - item consideration.

2. Treatment Of GST And Provincial Sales Tax ("PST") Should Be Clear

If costs are being sourced in Alberta, then of course PST does not apply, but it will apply in all other provinces. In B.C. the tax rate was 7% for many years, was increased to 7.5%, but is now back at 7%. The rate associated with GST is also 7%. If both taxes apply, 14% is added to costs.

When obtaining a particular cost, the cost of care expert should ascertain, and report, the cost with and without all applicable taxes. This avoids misunderstandings. For example (assuming no PST for simplicity), a retailer may quote a price of an item as "\$100 including GST", but some will mean that the total cost to the purchaser is \$100, and some will mean \$107.

The cost of care report should then report all relevant details, so that no misunderstanding is possible. For example, if the hourly cost of housekeeping services is \$17 plus 7% GST, the report should make that clear by, e.g. stating:

"The hourly cost of housekeeping service is \$17 plus 7% GST, equals \$18.19 per hour".

It would be ambiguous to say: "\$18.19 including GST". This could mean either $\$17 \times 1.07 = \18.19 , or $\$18.19 \times 1.07 = \19.46 .

Similarly, it would be ambiguous to say: "\$17.00 including GST". This could mean either $\$17 \times 1.07 = \18.19 , or $\$15.89 \times 1.07 = \17.00 .

As a general overview (but **NOT** intended as a substitute for checking with each provider; I am **NOT** a tax expert):

- The following are generally exempt from both taxes; medication, services of health professionals (psychologists, case managers, massage therapists, physios).
- Items purchased in the same location by both disabled and non - disabled individuals e.g. kitchen supplies, generally attract both PST and GST.

3. Need To Deduct “Ordinary Cost”, Or “Ordinary Living Expenses”

A cost of care expert may cite the cost of items which almost everybody purchases, but for which the plaintiff will incur increased costs due to his/her injuries. In such cases, the cost of care report should spell out both the plaintiff's cost, and (if the cost of care expert feels competent to venture an estimate) the corresponding “ordinary living expense” (i.e. cost if the plaintiff had not been injured).

Only the difference should be quantified by the actuary, because the clear legal principle is that only extra expenses due to the accident should be costed. Also, in such cases, a claim is often also made for future loss of earnings. Putting in “ordinary costs” in effect duplicates the award for future loss of earnings, because ordinary costs would have been met out of future earnings.

Cost Of Meals

Re the cost of meals while the plaintiff (or his/her spouse) is attending a pain clinic or is travelling to necessary medical or related appointments. I think that such cost should be reduced, to reflect that there would have been a cost (about half the outside cost) of eating at home. If the costs are a reasonable estimate of the cost of restaurant meals, and the cost of care expert's report made no deduction for ordinary cost, I might reduce the cost by half.

However, in one case, the cost of meals was very low (\$4.50 per meal, through meals on wheels). The cost of care expert stated that the cost of groceries for the plaintiff to prepare his own meals was not much less. I decided to set the cost at zero.

Another case involved a female plaintiff who was projected to be less able to cook for herself and her family. The cost of care expert concluded that:

- The plaintiff's reduced cooking capacity amounted to the equivalent of about 30 minutes per day.

- It would be impractical to provide direct replacement of this loss by hiring a replacement worker.
- A more practical approach is to provide a commensurate annual allowance for restaurant meals.

Should a deduction for “ordinary cost” be made in this case? I was unable to decide on either a yes or no answer, and stated in my report:

“I think that it is unclear, from an actuarial point of view, whether an ordinary cost reduction should be made in this case. I therefore show results both with and without such a reduction.”

Accommodation While Travelling To Medical Appointments, Or At A Pain Clinic

A deduction for “ordinary cost” should be made only if there is a direct saving in the individual’s other accommodation costs. For plaintiffs who do **NOT** live alone, there is no savings since the costs at home continue. Even for a single plaintiff, such costs are usually for short periods, so that there would only be a deduction if the individual did not have a permanent residence. In summary, such a deduction would usually **NOT** be made.

Furniture And Equipment

The most costly item in this category is often a mattress or bed, which must meet special requirements due to the plaintiff’s injury. For example, in one case the cost of care expert’s view was that the injured female plaintiff and her husband required twin beds, rather than their double bed. The initial purchase of these twin beds was thus entirely an extra cost to the plaintiff, and I made no deduction for ordinary costs. However, in factoring in the cost of replacing these twin beds in the future I did make a 50% deduction (rough approximate allowance only), since replacement of their existing double bed would be required.

A second example involved a plaintiff’s need for ergonomic chairs, both in the workplace and at home. The cost of care expert advised that this cost would be over and above that of an “ordinary” chair, and so I made no deduction for ordinary cost.

A third example involved special gardening tools. I obtained from the cost of care expert an estimate of the cost of ordinary tools, and deducted this.

Vehicle

If a specialized vehicle is being provided for the plaintiff, there needs to be some deduction of the ordinary cost of a vehicle, since the average person is expected to have some

expenditures on vehicles, or other transportation expenses.

The details surrounding the exact amount of a deduction can be complicated. I often apply a 50% deduction, again citing it as a rough approximate allowance only. A more exact calculation is usually impractical due to the extra time and expense it would involve.

Group Home Or Care Facility

If a plaintiff is projected to reside in a care home or group home, some allowance should be made for the portion of costs which relate to the plaintiff receiving food and lodging ("hotel cost"). What percentage of the group home or care facility's charges relate to it being a place where people are fed and lodged, as opposed to the portion of cost relating to services provided to the residents because they are disabled? The management of the care facility or group home is sometimes prepared to provide estimates.

An alternative measure of "ordinary cost" can be developed from population averages. Statistics Canada nationwide averages for 2001 indicate that the average female senior spends, annually, \$2,938 on food, \$6,204 on shelter, \$1,308 on household operation, and \$530 on household furnishings and equipment. The total of these expenditures is \$10,980, which provides one measure of ordinary living costs. If expenditures re health care (\$1,004), and personal care (\$509) are included, the \$10,980 figure increases to \$12,493.

4. Cases Where Plaintiff's Spouse (Or Significant Other, Or Child, Or Parent) Provides Significant Personal Care And Household Services

Suppose an elderly husband has been injured and his wife is providing considerable care and other assistance. The first issue is the extent to which the cost of care expert's costing should reflect the efforts of the wife. Do her efforts go beyond the expected? These are controversial issues, with cost of care experts having differing views, and it is also at least in part a legal issue.

However, to the extent a costing factors in the efforts of the wife, this should be identified and an alternative costing prepared (with higher figures) which does not recognize the wife's efforts. This will allow the actuary to quantify the contingency that the wife may die before the husband, or at some point be no longer physically able (or willing) to continue providing the services.

5. Costs Should Be Based On The Midpoint Of The Range

First, where there is a range, I suggest final costs (i.e. in the cost of care expert's cost summary) be based on the midpoint of the range. This is less work than showing a lower end cost or higher end cost. Usually the actuary will just apply the midpoint anyway.

Second, if a range is first given, and then a single figure is applied, it should be the midpoint of the range. Using the top of the range (when retained by plaintiff's counsel) may be interpreted as bias toward the plaintiff.

An exception may occur where the cost of care expert quotes a range which is intended as applying to people generally, but thinks that because of the particular situation of the plaintiff, the top (or bottom) of the range should apply. Another exception involves the cost of care expert first stating a preliminary range, but then refining it, and arriving at a single figure which is not the midpoint. For example, this may occur because the range is intended to apply generally, but due to the plaintiff's particular characteristics the low end or high end of the range is selected. If this is the cost of care expert's thought process, it should be fully explained in the report, or alternatively the cost of care expert should just give the final result.

6. Cost of Care Expert Should Be As Clear And Specific As Possible, But Need Not Answer Every Relevant Question

Points Where Cost Of Care Expert Need Not Give An Opinion

As already mentioned, examples of factors which may affect the exact timing of future costs may include:

- i. The timing of future joint replacement surgery. (Often, there will be various costs incurred immediately after the surgery).
- ii. The future time at which a teen - aged plaintiff would have become a homeowner, had the accident not occurred. (The cost of care expert may project that the plaintiff can cope with household tasks provided he or she continues to reside with his parents or in a small apartment, but will be unable to cope with the work involved in being a homeowner).

The cost of care expert need not feel compelled to give an opinion on such issues. This is usually viewed as a factual issue (i.e. to be decided on the facts of the case) and therefore a proper matter for the lawyer to give the actuary an instruction as to the assumption to be applied.

Additional examples are as follows:

- a. Regarding medications, a relevant consideration is the proportion of costs likely to be covered by Pharmacare. This proportion varies with the plaintiff's income. This raises an issue of the basis on which to project the plaintiff's income. Even if this issue can be overcome, the Pharmacare calculations are complicated. Most cost of care experts do not

attempt the Pharmacare - related calculations. I think this is appropriate, provided that the cost of care expert's report mentions that Pharmacare coverage has not been factored in.

b. Service providers who come to the plaintiff's home (e.g. occupational therapist, case manager) may charge for travel and mileage. As with sales taxes, these charges form part of the price paid for the service, and therefore in theory need to be included. However, in practice, it may sometimes be difficult to get the necessary detailed information. Again, this is acceptable so long as this issue is mentioned.

Re the purchase of certain items of furniture or equipment, similar points arise regarding costs associated with delivery and installation.

c. When dealing with a plaintiff resident outside Canada, the cost of care expert should:

- Try to ensure that local sales taxes are included in prices quoted.
- Clearly specify the applicable currency for each cost item. (For example, some costs may be sourced locally due to time and expense constraints). But the cost of care expert need not convert foreign currency amounts to Canadian dollars; the actuarial present value calculations will deal with that.
- For U.S. residents, ensure that issues relating to the effect of the plaintiff's injuries on health insurance premiums is addressed. A related issue is the cost of medical treatment which is government - funded in Canada but not in the U.S. This can be a significant cost item. The lawyer may wish to retain a separate U.S. expert just to address this point.

Need For Clarity And Specificity

I suggest that, in preparing cost calculations, cost of care experts always "show their work". This allows easier double - checking of the figures internally when preparing the report, and allows the actuary to follow how the cost was obtained, and quickly double - check the calculations. For example, if the requirement is for two visits per week by a homemaker, 3 hours per visit, \$20 per hour plus GST, then the resulting annual cost would be \$6,676.80, calculated by multiplying together the following:

- 2 visits per week.
- 3 hours per visit.
- 52 weeks per year (this could be adjusted downward to allow for the plaintiff's vacation time).
- \$20 per hour.

-1.07 (to add in GST).

$2 \times 3 \times 52 \times \$20 \times 1.07 = \$6,676.80$ per annum

The duration of an annual ongoing loss should be specified; e.g. is the cost projected to continue more or less indefinitely into the future? (If so, the actuary will assume that the cost continues for life). Without further detailed input from the cost of care expert, the actuary will assume that this is so. Thus, if the cost of care expert projects the annual cost as stopping at some point in the future, this should be clearly spelled out. In one case, the cost of care expert indicated that medication cost should be based on the current regime, but that the medications were subject to adjustment or elimination in future. This could have been interpreted as implying that it would be overstating costs to project the current cost indefinitely into the future. Upon further discussion with the cost of care expert, she indicated that she could not say that annual cost was more likely to increase or decrease. I described these comments in my report, and decided to project the current expense level for life. I would suggest that cost of care experts include such clarifications in their reports.

If a cost involves an initial purchase of an item, the cost of care expert should specify whether or not it needs periodic replacement and, if yes, at what frequency. If the need for replacement stops at some future time (e.g. upon retirement, if an item such as an ergonomic chair is required only in the workplace) this too should be specified. Sometimes, cost of care experts may omit replacement costs if they think it is unlikely that the individual will be alive at the time of the first replacement. I suggest that the cost of care expert specify the replacement times in such situations; the actuarial calculations will take proper account of the chance that the individual will survive.

7. Avoiding Overlap As Between Costs Of Group Home/Care Facility And Other Ongoing Costs

If the plaintiff is projected, at some point in the future, to move into a group home or care facility, the costs of various goods and services may be included in the cost of the care facility, but have also been costed separately, thus creating possible double - counting. For example, such goods and services could include homemaking, attendant care, occupational therapy, transportation costs, and various types of medical supplies. The cost of care expert should specify exactly which items are no longer required so that the actuary can avoid any double - counting.

8. Ensuring Consistency Between Projected Restrictions At Work And Projected Future Costs Of Care

There should be consistency between i. and ii. below:

i. The extent to which the replacement of the plaintiff's reduced capacity to perform

household work is included in future cost of care.

ii. The extent to which the plaintiff is precluded, according to medical and related opinion, from working at a physically demanding job.

If the plaintiff is projected to be able to pursue only part - time sedentary employment, considerable assistance with household work will be needed.

If there is little or no projected restriction on the plaintiff's ability to pursue employment involving physical labour, little or no assistance with household work will be needed.

"Household work" may include such items as housekeeping, cooking, cleaning, gardening, yard work, snow removal, chopping firewood for heat, painting, fixing and maintaining household appliances and/or motor vehicles.

In assessing the cost required re household work, the cost of care expert factors in the plaintiff's current residence, and perhaps possible future changes (e.g. A young person now lives at home with his parents, but may become a homeowner later). However, the cost of care expert should consider the possibility that the plaintiff is living in smaller accommodation as a result of financial hardship related at least in part to the event leading to the lawsuit.

9. Professional Interaction Between The Lawyer And The Expert

I think that the interaction between the lawyer (i.e. the client) and the actuary, and in particular the conditions re client influence on work product, are essential to maintaining my professional integrity and independence. I attach as an Appendix a 5 page commentary dealing with these issues. This commentary is also available at: <http://www.karpactuarial.com/paper/191509.pdf>.

There will be similar issues for all experts who deal with lawyers, and hopefully these comments will be of some interest to cost of care experts.

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