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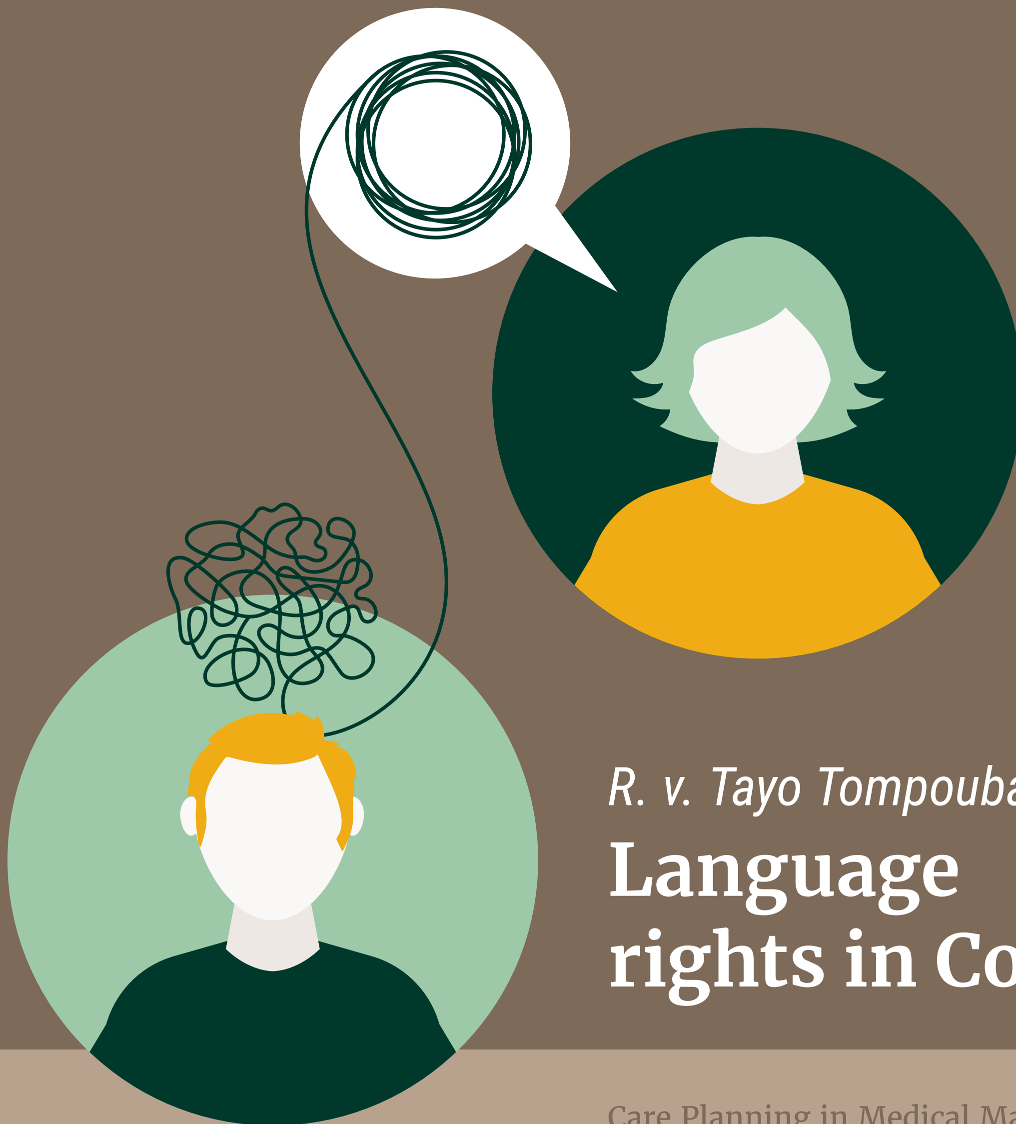

*R. v. Tayo Tompouba*

## Language rights in Court

Care Planning in Medical Malpractice:
**Making The Case For In-Home Care**

**Upcoming Criminal Interventions**

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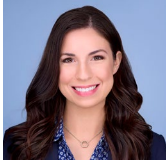
## Medical Malpractice



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# Care Planning in Medical Malpractice: Making the Case for In-Home Care

**This is the final installment of our series aimed at providing a detailed examination of the challenges and pitfalls in different areas of medical negligence lawsuits, and approaches to overcoming them. Each article has focused on specific injuries and highlighted the obstacles a plaintiff faces in bringing their case to a successful conclusion. Our next series, which will debut in the Winter 2024 edition of *the Verdict*, will focus on practical and evidentiary issues in medical malpractice.**

**This article concludes our current series by considering one of the most critical and costly aspects of any medical malpractice lawsuit: the client's care plan. It will proceed by describing the principles of autonomy, choice, and independence that underpin all cost of future care analyses, as repeatedly reiterated by the Supreme Court of Canada; flagging proposals for care that are commonly found in defence submissions and the case law, which contravene these principles; and providing specific advice on how to develop and present a care plan successfully in mediation and at trial.**

Few aspects of a medical malpractice lawsuit are as important to both counsel and client as the life care plan. For plaintiff's counsel, the care plan is the evidentiary basis for the assessment of costs of future care. When properly presented, "the life care plan can be a powerful tool of persuasion, whether persuading the defence to settle the case or persuading [the court] to award a fair amount of damages."[1] For the critically injured client and their family, who are often facing a scary and uncertain future, the care plan serves as a source of reassurance and empowerment, particularly when it is crafted with their input.[2]

The law in Canada concerning care planning in medical negligence cases is clear and well-established. The ultimate goal of an assessment of future care costs is to ensure that the injured plaintiff is adequately cared for. Expenses that further this goal are based on what a reasonable person with ample means would incur.[3]

With respect to the plaintiff's living arrangement — the focal point of every care plan, which inherently impacts the provision of all other aspects of care — courts across this country have repeatedly found that it is "difficult to conceive of any reasonably-minded person of ample means who would not be ready to incur the expense of home care."[4] Plaintiffs' counsel need not rely solely on this case law or common sense to support the idea that any reasonable person would choose this model of care over, say, a group home: a recent survey demonstrated that 91% of all Canadians, and nearly 100% of Canadians aged 65 years or older, report that they plan on living independently for as long as possible.[5]

Successfully applying these principles, however, is a difficult task. Aside from the persistent challenge of marshalling evidence to establish the need for in-home care, courts have

occasionally demonstrated a misapprehension of the case law, resulting in awards that are insufficient to provide adequate care. Further, defendant doctors and health authorities will often try to offset the costs associated with their negligence by arguing that a plaintiff can receive adequate care in an institution, group home, or shared living arrangement — proposals which are very often irreconcilable with the principles underpinning the case law. Plaintiffs' counsel must be strategic and forceful in opposing these claims, in order to ensure that their client secures the resources they need to live a healthy and fulfilling life, as they are entitled to under the law.

This paper will argue that, when developing a care plan with clients and experts and presenting this plan to opposing counsel and the court, plaintiffs' counsel is best served by emphasizing a rights-based approach to long-term care planning, rooted in the bedrock principles of autonomy, choice, and independence that were espoused by the Supreme Court of Canada's in the "damages trilogy"[6] and subsequent judgments. To do so successfully, plaintiffs' counsel must engage with experts who are able to tender evidence that endorses in-home care and undermines alternate forms of care which are substandard and inappropriate.

## Principles of Future Care Awards: The Damages Trilogy

Costs for care, more so than any other head of damage, are notoriously difficult to determine, given the inherent uncertainty of the future. For this reason, future care costs are said to be "assessed" rather than "calculated," and the "overall reasonableness of the final award for future care is more important than accuracy in the individual mathematical steps used to arrive at that award."[7]

In guiding the assessment of costs of future care, the foremost authorities are the three cases that comprise of the Supreme Court of Canada's 1978 Damages Trilogy: *Andrews v. Grand & Toy Alberta Ltd.*, *Thornton v. Prince George School District No. 57*, and *Arnold v. Teno*. The


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approach to costs of future care that was endorsed in these cases was summarized by Mr. Justice Spencer in *Arnold*: "the prime purpose of the Court is to assure that the terribly injured plaintiff should be adequately cared for during the rest of her life."[8]

For a catastrophically injured infant plaintiff with a normal life expectancy, adequate care may be staggeringly expensive. Of course, an award for adequate care must be reasonable and fair to both parties. Yet, as Mr. Justice Dickson noted in *Andrews*, "fairness to the other party is achieved by assuring that the claims raised against him are legitimate and justifiable"[9] — *not* by providing an unprincipled deduction to the costs incurred through the tortfeasor's negligence.

In *Andrews*, the Supreme Court of Canada considered a judgment of the Alberta appellate court. The appeal court had concurred with the trial judge that in-home care was preferrable to institutional care, but significantly reduced the trial judge's award for that in-home care, solely on the basis that it was "vastly the most expensive" of all available options.[10] The Supreme Court of Canada rejected this line of reasoning, on the following basis:

> It cannot be unreasonable for a person to want to live in a home of his own. … With respect to Andrews' disinclination to live in an institution, the [Appeal] Court commented: "He might equally say that he would not live in Alberta, as he did not wish to face old friends, or for any other reasons, and that he wished to live in Switzerland or the Bahamas." Andrews is not asking for a life in Europe or in the Caribbean. He asks that he be permitted to continue to live in Alberta and to see his old friends, but in his own home or apartment, not in an institution.[11]

The Damages Trilogy, as well as subsequent judgments issued by the Supreme Court of Canada and other courts across the country, make clear that an injured individual should be compensated so that he or she "can live as complete and independent a life as reasonably attainable through an award of damages."[12] The case law favours in-home care, where the plaintiff is able to exercise the range of choice that any other non-injured person in this country would ordinarily be able to, including what daily activities to partake in, who to spend time with, whether to adopt a pet, and what colour to paint the walls. A cost of future care assessment is "not an exercise in 'how to save money' or to permit the plaintiff to 'get by' or 'make do' with cheaper care,"[13] but "how best to compensate the plaintiff for her grievous injuries and her loss of quality of life that occurred through no fault of her own but, rather, because of the negligence of the defendant."[14]

In this way, the Damages Trilogy implicitly promotes a rights-based approach to long-term care, which is rooted in the principles of choice, independence, and equality between disabled and non-disabled Canadians. The case law on care planning is augmented by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which has now been incorporated into Canadian[15] and British Columbian statutes[16] and, under general principles of statutory construction, ought to inform the interpretation of domestic law.[17] Under the UNCRPD, persons with disabilities not only possess the right to live independently and be included in the community, but they must also enjoy respect for their inherent dignity and individual autonomy, particularly with regard to decisions that impact their lives. This is in line with the practice of courts in British Columbia, which have often considered the plaintiff's preferences to be an important factor in opting for one model of care over another.[18]

## Wandering from Precedent: Cost-Saving Over Adequate Care

Despite the clarity of the Damages Trilogy and subsequent judgments, courts have often wandered from the principles that underpin this precedent. One reason for this is because defence counsel frequently propose substandard models of care, which are framed as providing services that are analogous to what is provided through in-home care but at a reduced cost. Historically, the defence touted the option of having disabled plaintiffs live in highly institutionalized "group homes" and long-term care facilities,[19] but given contemporary policy trends in favour of community-based care, proposals for shared living programs, like those sponsored by Community Living B.C., are now more common.

Defence care plans that rely on Community Living B.C. services are flawed for at least three reasons. First, such a proposal may inappropriately foist the consequences of their client's negligence onto taxpayers, as Community Living B.C. is a Crown corporation funded by the province.[20] Second, on its own admission, requests for Community Living B.C.'s services far outpace funding and availability, which "jeopardize[s] the sustainability" of its programming.[21] Third, and most importantly, the success of such shared living arrangements, at present, depend entirely on the benevolence of the home share provider. The service recipient does not live in their own home; they reside in another person's home, where they do not exercise true independence, choice, or control over their lives and are at the mercy of largely untrained and almost entirely unregulated home share providers.[22]

One recent case provides an extreme example of the kind of conditions persons in shared living arrangements may experience. Florence Girard, a 54-year-old woman with Down syndrome, died of starvation in the Port Coquitlam home of her home share provider in 2018, after that home share provider installed a locked gate on her bedroom door and unilaterally decided to stop taking her to medical appointments and social activities. This caretaker's abuse went unchecked because the non-profit organisation overseeing the shared living arrangement, which was funded by Community Living B.C., had provided virtually no oversight of Florence's care in the two years preceding to her death.[23]

In short, group homes, long-term care facilities, and government-funded shared living arrangements are contrary to the principles of choice and independence underpinning the Damages Trilogy. No reasonable person of ample means would choose to live in these environments.

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Yet, even where in-home care is relatively uncontested and is ultimately awarded, the courts have occasionally erred in their understanding of the principles that frame the aforementioned precedents. Recently, for instance, the Alberta Court of King's Bench in *KY v. Bahler*[24] assessed the costs of future care for twin infant plaintiffs, who both sustained brain injuries as a result of the defendant doctor's negligence. Although in-home care was properly awarded, the court seriously contemplated "some form of institutionalization" for the plaintiffs. This option was only rejected because no evidence of group homes within the community where the plaintiffs' family lived had been tendered — not because "institutionalization" is completely contrary to the plaintiffs' ability to exercise autonomy and independence.

The challenge for plaintiffs' counsel in care planning is therefore threefold: they must ensure that the court has a full understanding of the principles underpinning precedent; they must ensure their client's care plan is congruent with these principles; and they must tender evidence demonstrating that the defence's care plan is in contravention with these principles.

## Improving the Long-Term Care Plan

Crafting a viable care plan demands considerable time and expertise. Although the case law is clearly supportive of independent living, the many instances in which courts have failed to appreciate the nuances of the precedent found in the Damages Trilogy and elsewhere demonstrate that such care is not necessarily a presumption.

The team of experts that counsel should retain when drafting the care plan may include physicians; economists; certified life care planners; rehabilitation counsellors; mental health, occupational, and physical therapists; social workers; and Indigenous consultants who can opine on Jordan's Principle programming.[25] These experts must be able to opine on what sorts of resources the client will need and why in-home care is necessary to meet these care needs.

Experts must not only speak to why in-home care is preferrable, but why other options which may be presented by defence counsel are unsuitable for the plaintiff's needs.

**In this respect, lay witness testimony is often helpful to explain funding shortages and detail the bleak reality of what life within group care homes and in shared living arrangements often entails.[26]**

Lay witness testimony may also be solicited to describe social and recreational programming available in the community, which defence counsel often incorrectly identify as a benefit of group homes.[27]

While the court will understandably be mindful of the extent to which the plaintiff is receiving and will continue to receive care through government funding, counsel should ensure that this does not automatically result in a negative contingency. Given steady increases in the cost of long-term care,[28] as well as the possibility of reductions in healthcare funding,[29] a positive contingency may actually be warranted. Plaintiffs' counsel may wish to ask an expert to provide evidence on funding gaps and trends.

Counsel must be cognisant of the fact that settlements may need to be approved by the Public Guardian and Trustee (PGT), depending on the client's personal circumstances. The PGT is mandated by its enabling statute to protect the legal and financial interests of children under age 19, and the legal, financial, personal, and health care interests of adults who require assistance in their decision-making.[30] Letters to the PGT should provide a comprehensive overview of the experts' opinions, and ought to make direct connections between the settlement amount, the expert evidence, and the best interests of the client, as determined on an objective basis and according to the client's wishes.

Throughout this entire process, the focus must remain on the plaintiff and his or her aspirations for their life. Every effort should be made to ensure that the care plan reflects the client's vision of what a happy, healthy, and fulfilled life looks like for them. If the client's disability is so profound that they are unable to articulate and communicate these wishes, counsel must consult with their supported decision-making team, in a way that is respectful of the client's inherent dignity.

1 Katherine Brown-Henry, "A Plaintiff's Attorney's Perspective on Life Care Planning" in Roger O. Weed and Debra E. Berens (eds), *Life Care Planning and Case Management Handbook* (4th edn, Routledge, 2019) at 654.

2 For a discussion on how meaningful input in a care plan can enhance subjective senses of empowerment, see Tamar Heller, Haleigh M. Scott, and Matthew P. Janicki, "Caregiving and intellectual and developmental disabilities and dementia: report on the pre-summit workgroups on caregiving and intellectual and developmental disabilities" (2017) *National Task Group on Intellectual Disabilities and Dementia Practices*. Available at https://pubmed.ncbi.nlm.nih.gov/30090847/.

3 *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229 at 241.

4 *Ibid* at 245.

5 "Pandemic Perspectives on Ageing in Canada in Light of COVID-19 Findings from a National Institute on Ageing/TELUS Health National Survey" (October 2020) National institute on Ageing at 3. Available at https://static1.squarespace.com/static/5c2fa7b03917eed9b5a436d8/t/5f85fe24729f041f154f5668/1602616868871/PandemicPerspectives+oct13.pdf.

6 The Damages Trilogy is comprised of *Andrews, supra* endnote 3; *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267; and *Arnold v. Teno*, [1978] 2 S.C.R. 287.

7 Erika Chamberlain et al, *Fridman's The Law of Torts in Canada* (4th edn, Carswell, 2020) at 663; for recent applications of this principle in British Columbia, see *Jurczak v. Mauro*, 2013 BCCA 50 at para. 36, and *Marriott v. Peterson*, 2021 BCSC 1066 at para. 64.

8 *Arnold, supra* endnote 6 at 320.

9 *Andrews, supra* endnote 3 at 230.

10 *Ibid* at 242.

11 *Ibid* at 242, 245.

12 *Travis v. Kwon*, 2009 BCSC 63 at para. 110.

13 *Ho v. Ip*, 2019 BCSC 2220 at para. 94.

14 *Williams v. Low*, 2000 BCSC 345 at para. 25; see also Milina v. Bartsch, 49 B.C.L.R. (2d) 33 at 182-184.

15 See Accessible Canada Act, S.C. 2019, c. 10.

16 See Accessible British Columbia Act, SBC 2021, c. 19; Community Living Authority Act, SBC 2004, c. 60.

17 Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed (Markham, Ontario: LexisNexis, 2014) at 569.

1. See *Ediger v. Johnston*, 2009 BCSC 386 at para. 251; *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 1968 at para. 302.

19 For a discussion on why many group homes and long-term care facilities in Canada today are akin to institutionalization, see Megan Linton and Kendal David, "Institutionalization of People Labelled with Intellectual or Developmental Disabilities in Long-Term Care" *Inclusion Canada*. Available at https://invisibleinstitutions.com/policy-briefs.

20 See *Fullerton (Guardian ad litem of) v. Delair*, 2006 BCCA 339 at para. 6.

21 "What We Heard: Summary of CLBC's Engagement with Home Sharing Providers and Home Share Providing Agencies" (June 2018) Community Living B.C. at 3. Available at https://www.communitylivingbc.ca/wp-content/uploads/HSP-Engagement-Report-Final.pdf. See also "Review of Community Living British Columbia", Internal Audit & Advisory Services (2011) at 1. Available at https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/internal-corporate-services/internal-audits/clbc-review.pdf.

22 For a discussion on the lack of oversight of home sharing arrangements in British Columbia, see Rachelle Hole et al, "Home Sharing and People with Intellectual Disabilities: A Qualitative Exploration" (2015) 12:4 Journal of Policy and Practice in Intellectual Disabilities 279-287 at 285.

23 *R. v. Dahl*, 2022 BCSC 1387; see also Kate McInnes, "Bill C-295's blind spot? Persons with disabilities in community care" (April 11, 2023) Law360 Canada. Available at https://www.law360.ca/ca/articles/1761719/bill-c-295-s-blind-spot-persons-with-disabilities-in-community-care-kate-mcinnes.

24 2023 ABKB 280.

25. For a discussion on the challenges with securing Jordan's Principle programming, see Lori Chambers and Kristin Burnett, "Jordan's Principle: The Struggle to Access On-Reserve Health Care for High-Needs Indigenous Children in Canada" (2017) 41:2 American Indian Quarterly 101-124.

26 *See Brodeur, supra* endnote 19, at paras. 304-313.

27 For examples of defence claims to this effect, see *Cherry (Guardian) v. Borsman*, [1990] B.C.J. No. 2576 (Q.L.) at para. 125; *Brodeur, ibid* at para. 333; Ediger, supra endnote 19, at para. 260.

28 See "Long-term care costs in Canada projected to triple to $71B in only 30 years" (October 8, 2019) National Institute on Ageing. Available at https://www.niageing.ca/commentary-posts/10/7/long-term-care-costs-in-canada-projected-to-triple-in-only-30-years.

29 See "Health care funding in Canada" (October 18, 2022) Canadian Medical Association. Available at https://www.cma.ca/latest-stories/health-care-funding-canada#:~:text=A%20recent%20report%20on%20health,funding%20is%20projected%20to%20decline.

30 Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383.

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