

## Focus PERSONAL INJURY

# Understanding cost of guardians



**Susannah Roth**

When it comes to identifying heads of damages which a client may have suffered, as a famous man said it's the "unknown unknowns" that we have to worry about.

One head of damages which is all too well known to estate and trust lawyers is the costs of a substitute decision-maker (often referred to as guardianship costs). These damages are relevant in a personal injury claim where a person requires a guardian or attorney for property and/or personal care to act for them and make decisions on their behalf since they are unable to because of the injury they have sustained.

When it comes to these costs, it is important for the personal injury lawyer to both educate him or herself about them, and to have an expert provide an opinion and, where required, act as an expert witness.

Substitute decision-makers, be they court-appointed guardians or in some cases attorneys acting under a power of attorney (I will refer to them as guardians for the remainder of this article but this discussion of costs also applies to attorneys, with some exceptions) will incur costs on behalf of the injured person which are usually payable from the injured person's property. Assuming the injured person did not require a substitute decision-maker before their injury occurred, these costs are or will be incurred by the injured person as a reasonably foreseeable result of their injury.

Assuming no unusual circumstances, the main issue in dispute for this head of damages is likely to be the quantum of these costs. These costs generally fall into two main categories: legal costs and compensation. Taking the latter category first, while compensation for guardians of property is better defined by statute and case law, both guardians of property and guardians for personal care are generally entitled to compensation.

The quantum of compensation for guardians of property is usually primarily based on a percentage of the projected value of the incapable person's assets (often mostly the damages award arising from their personal injury claims). The percentages are set pursuant to regulation under the Ontario *Substitute Decisions Act* at 3 per cent of receipts and 3 per



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cent of disbursements, plus an annual management fee of and three-fifths of 1 per cent of the average value of the assets under management (subject to adjustment by a court).

Legal costs can be broken down into several different subcategories of costs, such as the initial court application for guardianship; the amendment of the management plan (the plan which sets out how the guardian will manage the injured person's assets) upon the conclusion of the legal action; the multiple passings of accounts likely required under the guardianship appointment judgment often for the injured person's lifetime, one or more replacement guardian appointments, etc. The reasonable amount, projected number and frequency of these costs will depend on the incapable injured person's particular circumstances and, in part, the projected likely damages award arising from their personal injury claims. For example, an older person with a younger person or trust company appointed as their guardian may

not reasonably need to have their guardian replaced during their lifetime, whereas a minor child will not only need an original guardian to be reappointed upon reaching the age of majority but will likely need at least one replacement guardian appointed during their lifetime.

If the projected damages are sufficiently large or the circumstances otherwise warrant it, the retainer of an expert to review and opine on the types and amount of these costs may be prudent. The expert retained should be knowledgeable not only of the law and legal principles at issue but should also carefully review the individual circumstances to determine how the law applies in each case. In at least one case where the quantum of guardianship costs was in dispute, the court was critical of expert evidence which failed to take into account the individual's unique circumstances: *Sandhu (Litigation Guardian of) v. Wellington Place Apartments* [2006] O.J. No. 2448.

Guardianship costs can sometimes amount to several hundreds of thousands of dollars over the course of the incapable person's lifetime. Failing to include them as a head of damages could result in the incapable person having to pay these costs from other funds intended for income replacement or injury rehabilitation. Consider speaking to an expert each time a client may have such damages arising from their injury to ensure appropriate and necessary information and/or evidence is obtained in every case.

**Susannah Roth is a lawyer with O'Sullivan Estate Lawyers, whose practice includes all aspects of estates and trusts law, including guardianship matters and legal opinion work.**



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