

1994

**Province of
British Columbia**

**Report on
Standardized Assumptions for
Calculating Income Tax Gross-up
and Management Fees
in Assessing Damages**

**LAW REFORM
COMMISSION OF
BRITISH COLUMBIA**

MINISTRY OF ATTORNEY GENERAL

**LAW REFORM COMMISSION
OF BRITISH COLUMBIA**

**REPORT ON
STANDARDIZED ASSUMPTIONS FOR
CALCULATING INCOME TAX GROSS-UP
AND MANAGEMENT FEES
IN ASSESSING DAMAGES**

LRC 133

January, 1994

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, Q.C., *Chairman*
LYMAN R. ROBINSON, Q.C.
THOMAS G. ANDERSON

Gregory G. Blue is Legal Research Officer to the Commission.

Sharon St. Michael is Secretary to the Commission.

Linda Grant provides text processing and technical copy preparation.

The Commission offices are located at Suite 203, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2G3.

The Law Reform Commission gratefully acknowledges the financial support of the Law Foundation of British Columbia in carrying out this project.

Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia.

Report on standardized assumptions for calculating income tax gross-up and management fees in assessing damages

(LRC, ISSN 0843-6053 ; 133)

“Report of the Special Advisory Committee on Standardizing Assumptions Relating to Income Tax Gross-up and Management Fee Calculations.” -- Table of contents.

ISBN 0-7726-2045-8

1. Damages - Taxation - British Columbia. 2. Income tax - Law and legislation - British Columbia. 3. Investments - Taxation - British Columbia. 4. Investments - Law and legislation - British Columbia. I. Law Reform Commission of British Columbia. Special Advisory Committee on Standardizing Assumptions Relating to Income Tax Gross-up and Management Fee Calculations. II. Title. III. Title: Report of the Special Advisory Committee on Standardizing Assumptions Relating to Income Tax Gross-up and Management Fee Calculations. IV. Series: Law Reform Commission of British Columbia. LRC ; 133.

KEB511.5.D35L38 1994
KF6752.L38 1994

343.71105246

C94-960067-9

**TO THE HONOURABLE COLIN GABELMANN
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:**

The Law Reform Commission of British Columbia has the honour to present the following:

**REPORT ON
STANDARDIZED ASSUMPTIONS FOR
CALCULATING INCOME TAX GROSS-UP
AND MANAGEMENT FEES
IN ASSESSING DAMAGES**

In 1992, the Law Reform Commission constituted a Special Advisory Committee to consider the possibility of developing a set of standardized assumptions to be used in calculating the income tax gross-up and management fees when they form part of an award of damages for personal injury or under the *Family Compensation Act*. The Committee was asked to report back to the Law Reform Commission with its conclusions and recommendations.

The Committee's Report has now been formally transmitted to the Law Reform Commission. After careful consideration, the Commission has adopted the conclusions and recommendations of the Special Advisory Committee as its own.

The Committee's Report is reproduced in full as part of this Report. It includes appendices setting out the recommendations in the form of guidelines along with draft enabling legislation that would permit the guidelines to be promulgated.

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A. Background to this Report

The past two decades have seen significant changes in the way that damages for personal injuries, and those arising under the *Family Compensation Act*, are assessed.¹ Formerly, the customary practice was to assess damages on a “global” basis with no particular value being attached to particular portions of the victim's loss. In the mid-1970's, this approach began to be replaced by a more analytical method of assessing damages. This was characterized by a practice of itemizing specific heads of future loss and assigning specific values to them. This was accompanied by the greater use of actuarial evidence in establishing the present value of future losses and an increased sophistication on the part of judges and lawyers in dealing with that evidence.² All of these innovations were aimed at achieving greater precision and fairness in the assessment of damages.

Two particular ways in which the courts attempt to achieve precision are the subject of this Report. The first concerns an additional amount added to certain damage awards to preserve their integrity in the face of potential erosion through the operation of our income tax laws. This is the so-called “income tax gross-up.” The second is the “management fee.” This is an additional amount that, where necessary and appropriate, may be included in a damage award to compensate the injured party for the cost of engaging professional assistance in the management and investment of the award.

While these innovations contribute to a greater measure of precision in the assessment of awards, there is a price to be paid in achieving it. Dealing with these issues tends to make trials longer and more complex. This results in greater expense to litigants and increased costs in the administration of civil justice generally.

B. The Special Advisory Committee

In mid-1992, a suggestion was received from the Judges' Law Reform Committee that the Law Reform Commission add to its program an examination of income tax gross-up and management fees. Its interest was, we understand, stimulated by a suggestion that if a series of standardized assumptions could be developed in relation to calculating

1. *Family Compensation Act*, R.S.B.C. 1979, c. 120. See generally, Law Reform Commission of British Columbia *Working Paper on Pecuniary Loss and the Family Compensation Act* (No. 69, 1992).

2. These developments are discussed at greater length in Part II, *infra*, at p. 11 (2. The “Trilogy” in the Supreme Court of Canada).

these elements of a damage award, the result could be a significant saving in time and money for litigants and the justice system.

Our approach to this topic involved the creation of a Special Advisory Committee³ whose membership represented an appropriate blend of legal, actuarial, economic and taxation expertise. Its mandate was to consider the general feasibility of standardized assumptions for calculating income tax gross-up and management fees, identify the elements of these awards which are amenable to standardized assumptions and to recommend the contents of those assumptions.

The Committee approached its task with great energy and, in January, 1994, after several months of sustained effort, the Committee submitted its Report to the Law Reform Commission. The whole of the Committee's Report is reproduced as Part II of this document. The Report sets out the composition and methodology of the Committee as well as the Committee's final recommendations.

The core recommendation of the Committee is that the *Law and Equity Act* be amended to enable the promulgation of "guidelines" to govern the calculation of income tax gross-ups and the awarding of management fees, along with recommendations as to the content of those guidelines.

C. The Law Reform Commission's Approach to the Committee's Report

The Report of the Special Advisory Committee was subjected to a thorough review by the members of the Law Reform Commission.⁴ As a result of this review, we endorse the Committee's recommendations and adopt them as our own. The guidelines proposed are realistic and detailed and, if implemented, should go far to achieve their objectives.

D. Acknowledgments

3. The *Law Reform Commission Act*, R.S.B.C. 1979, c. 225 contemplates the creation of such committees. S. 4 provides:

4. The commission may appoint committees, the members of which need not be members of the commission, and may refer any matter to committees for consideration and report to the commission. The Lieutenant Governor in Council may authorize the payment of travelling and out of pocket expenses incurred by the members of a committee in carrying out their duties.

4. This process was considerably eased by the fact that the Commission's Chairman had been a member of the Committee and a senior member of the Commission's research staff acted as Reporter to the Committee.

The Commission was fortunate that a group of knowledgeable and uniquely qualified individuals agreed to serve on the Special Advisory Committee. The resulting Report is a reflection of the diligence and expertise which they brought to their task. We would like to express our gratitude to each member of the Committee for the time and effort that has been devoted to this study.

Our particular thanks to the Honourable Mr. Justice L.S.G. Finch who chaired the Committee. We would also like to acknowledge the very significant contribution of Gregory G. Blue, who acted as Reporter to the Committee.

We endorse the Committee's Report. Its conclusions and recommendations are also those of the Law Reform Commission.

On Behalf of the Law Reform
Commission of British Columbia

Arthur L. Close, Q.C.
Chairman

PART II

REPORT OF THE SPECIAL ADVISORY COMMITTEE

**Law Reform Commission of British Columbia
Special Advisory Committee on Standardizing
Assumptions Relating to Income Tax Gross-Up
Calculations and Management Fees**

Committee Chairman:

Hon. Mr. Justice Lance Finch

Committee Members:

Patrice Abrioux	(Fraser, Quinlan & Abrioux)
Allan Brown	(The Coles Group)
Rob Carson	(Associated Economic Consultants Ltd.)
Arthur L. Close	(Law Reform Commission)
Jeremy Collisbird	(Eckler Partners Ltd.)
Gregory Steele	(Steele & Co.)
Kevin Turnbull	(Associated Economic Consultants Ltd.)

January 24, 1994

To The Law Reform Commission of
British Columbia

I am pleased to submit, on behalf of the Special Advisory Committee, its Report on Standardizing Assumptions Relating to Income Tax Gross-Up Calculations and Management Fees.

The Report contains recommendations which, if implemented, would greatly simplify the way in which certain recurring issues in personal injury and wrongful death cases are dealt with. This should result in savings in time and money for litigants and greater fairness and efficiency in the administration of civil justice in the Province.

Yours sincerely

Hon. Mr. Justice Lance Finch
Committee Chairman

**REPORT
OF THE SPECIAL ADVISORY COMMITTEE
ON
STANDARDIZING ASSUMPTIONS RELATING TO
INCOME TAX GROSS-UP AND
MANAGEMENT FEE CALCULATIONS**

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**REPORT
OF THE SPECIAL ADVISORY COMMITTEE
ON
STANDARDIZING ASSUMPTIONS RELATING TO
INCOME TAX GROSS-UP AND
MANAGEMENT FEE CALCULATIONS**

CHAPTER I

INTRODUCTION

A. The Committee and Its Mandate

1. CREATION BY THE LAW REFORM COMMISSION

In May, 1992 the Law Reform Commission formally added to its program a project on standardization of the assumptions used in calculating the income tax gross-up on personal injury damages. This was done in response to expressions of concern on the part of the judiciary, the practising Bar, and various writers regarding the effect of the gross-up on the length and cost of court proceedings. Those expressing concern emphasized the desirability of creating a set of standard actuarial and economic assumptions that would prevent the need for detailed evidence and cross-examination on the techniques used by experts to arrive at an appropriate amount in individual cases.

To assist in developing standardized assumptions, the Law Reform Commission formed a Special Advisory Committee under section 4 of the *Law Reform Commission Act*¹. The Committee met for the first time in October, 1992 and held 10 subsequent meetings during 1992-93. The Committee is now pleased to present its Report to the Commission.

2. COMPOSITION OF THE SPECIAL ADVISORY COMMITTEE

The membership of the Committee reflects the categories of expertise involved in the determination of the gross-up as an element of damages in a serious personal injury lawsuit. The members are:

Honourable Mr. Justice Lance Finch (Chair)
Court of Appeal for British Columbia

1. R.S.B.C. 1979, c. 225. S. 4 states:

4. The commission may appoint committees, the members of which need not be members of the commission, and may refer any matter to committees for consideration and report to the commission. The Lieutenant Governor in Council may authorize the payment of travelling and out of pocket expenses incurred by the members of a committee in carrying out their duties.

CHAPTER I: INTRODUCTION

Jeremy Collisbird (actuary)
Eckler Partners Ltd.

Allan Brown (actuary)
The Coles Group

Robert Carson (economist)
Associated Economic Consultants Ltd.

Gregory Steele (barrister and solicitor)
Steele & Company

Patrice Abrioux (barrister and solicitor)
Fraser, Quinlan & Abrioux

Kevin Turnbull (economist and tax accountant)
Associated Economic Consultants Ltd.

Arthur Close (barrister and solicitor)
Chair, Law Reform Commission

Gregory G. Blue, a member of the staff of the Law Reform Commission, acted as Reporter to the Committee.

3. TERMS OF REFERENCE

Terms of reference were prepared by the Law Reform Commission and accepted by the Committee at its first meeting. They appear as Appendix A to this Report. Briefly summarized, the terms of reference extend to

- identifying which components of the gross-up calculation are amenable to standardized assumptions and which are, of necessity, tied to the facts of individual cases;
- developing standard assumptions for those components of the gross-up calculation that are suited to them;
- developing standard assumptions to be used in fixing an appropriate management fee in cases where it is a proper element of a damages award;
- if possible, facilitating the application of the assumptions by means of tables, algorithms, etc.;

CHAPTER I: INTRODUCTION

- identifying the most appropriate legal format for implementing the standardized assumptions;
- developing a process for periodic review of the standardized assumptions.

CHAPTER II

INCOME TAX GROSS-UP ASSUMPTIONS

A. What Is A Gross-Up?

1. THE PURPOSE OF COMPENSATION

(a) General

The principle of compensation is to restore someone who has incurred a loss to the position that person would have been in if no loss had been incurred. This idea lies at the foundation of the law of damages.¹ Perfect compensation may be unattainable, but an award of damages should represent the actual extent of the loss, insofar as it can be determined.

(b) Past and Future Loss

The effects of a loss may have been felt entirely in the past. In that case, the loss can normally be expressed as a fixed amount. In other cases, its effects may extend into the future. Often these losses will be felt not on a single occasion, but on a recurring basis over an extended period of time. Serious personal injury cases, for example, often involve complete loss of the ability to earn future income and costs associated with future care. Such prospective losses consist in fact of streams of future payments foregone, or streams of future expenses that would not otherwise have been necessary.

Quantifying future losses that arise on more than one occasion requires the use of special mathematical techniques.

2. DISCOUNTING OF AWARDS TO PRESENT VALUE – A MEANS OF DELIVERING FUTURE PURCHASING POWER

(a) General

An award of damages has the form of a lump sum of money. Since damages can be invested to produce income, awarding them simply as the sum of lost future payments or the sum of the costs to be incurred would result in overcompensation. Eliminating the potential for overcompensation involves recognizing the time value of money. The value of one dollar to be received a year from now is less than one dollar now, because

1. *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Livingstone v. Rawyards Coal Co.*, (1880) 5 App. Cas. 25, 39 (H.L.). The “trilogy” cases affirmed the primacy of the principle of full compensation in the law of damages in Canada, making irrelevant any distinctions between “full” and “fair” compensation that were apparently made in some earlier English and Canadian decisions. See the section below headed “2. The “Trilogy” in the Supreme Court of Canada” (p. 11).

CHAPTER II: GROSS-UP ASSUMPTIONS

that lesser sum of money can be invested immediately to yield exactly one dollar in a year's time.

To arrive at the *present value* of the amount of money needed to cover a prospective loss consisting of a stream of lost future payments or costs yet to be incurred, we reverse the process for calculating the amount to which an invested fund will grow in a given time period.

For example,² to calculate the size of a fund of \$1,000 invested at an annual interest rate of 5% after one year, the principal amount of \$1,000 is multiplied by the interest rate. The amount of interest obtained is then added to the principal, yielding a final value of \$1,050. This is the same as multiplying the principal sum by one plus the interest rate. In mathematical terms:

$$\text{Value at end of year} = P(1+r)$$

where: P = principal
r = the annual interest rate, expressed as a decimal amount.

If the \$1,000 were to be invested for two years at 5% per annum, the size of the fund at the end of that period would be calculated by first determining the amount it would reach in one year, then multiplying that amount by the yield in the second year, adding the amount of interest so obtained to the amount the fund reached after the first year. This can be expressed:

$$P(1+r)(1+r)$$

or

$$P(1+r)^2$$

This yields a fund of \$1,102.50 after two years.

From this reasoning is derived the general formula:

2. In this and in the following examples, it is assumed for ease of explanation that interest is compounded annually.

CHAPTER II: GROSS-UP ASSUMPTIONS

$$FV_n = PV(1+r)^n$$

where FV_n = future value after n periods
 PV = present value
 r = the interest rate, expressed as a decimal amount
 n = the number of time periods that will elapse before an amount is to be received (or expended)

To arrive at the present value, the process is reversed by dividing the future value by $(1+r)^n$ (sometimes called the *discount factor* when used in this way):

$$\frac{\text{Future Value}}{(1+r)^n} = \text{Present Value}$$

This process of dividing by $(1+r)^n$ to arrive at present value is called *discounting*. The rate r , when used to calculate present value, is called the *discount rate*. The general formula for discounting a future amount to its present value is:

$$PV = \frac{FV_n}{(1+r)^n}$$

Thus, if a plaintiff with an annual income of \$40,000 will be totally unable to work for one year and the annual interest rate is 5%, the amount that should be awarded now (PV) to compensate the plaintiff is:

$$\frac{\$40,000}{1.05}$$

or \$38,095.24.

If the plaintiff will be unable to earn income for two years, and would have earned \$40,000 in the second year also, the amount required to compensate for the loss of two years' salary is

$$\frac{\$40,000}{1.05} + \frac{\$40,000}{1.05^2}$$

or \$74,376.42.³

Discounting to present value is a technique that is routinely employed in calculating damages for future losses. The sum of the present values of individual future losses represents the amount the plaintiff is entitled to receive as damages for those losses, before adjustment for the other factors that we will mention below.

*(b) Inflation, the Real Rate of Return,
and the Prescribed Discount Rate*

The selection of a discount rate cannot depend solely on current and projected rates of return on investment, because at any given time inflation accounts for a portion of the nominal rate of investment return. Everyone is acquainted with nominal rates of return. They are the rates quoted by financial institutions. Average nominal interest rates are normally higher than the rate of inflation. Since the portion of a nominal interest rate that is equivalent to the inflation rate serves only to offset the erosion of the value of the plaintiff's money due to inflation, the true return to the investor is the difference between the nominal rate of return and the rate of inflation. This difference is called the *real* rate of return on investment.

Inflation increases the absolute numbers of dollars that will be required to meet future losses because it decreases the purchasing power of each dollar. If the influence of inflation is not taken into consideration in arriving at a discounted amount which, when invested, will yield the total of the stream of future income or expenses, the plaintiff will be under-compensated.

Future real rates of return on investment cause the fund to grow at a rate above the level of inflation. Both projected inflation and projected real rates of return must be considered, therefore, in selecting a discount rate that will avoid under-compensation.

Since inflation has proved to be variable in the past and

3. In this and in the preceding examples, present values have been calculated "in arrears," *i.e.*, as though payments are received or expenses incurred at year-end. In practice, calculations reflect payments received or expenses incurred over the course of a year.

CHAPTER II: GROSS-UP ASSUMPTIONS

cannot be predicted with confidence, and because real rates of investment return have tended to be relatively stable, the accepted solution for dealing with the combined influence of investment return and inflation on the present value of a damage award is to discount by the anticipated long-term real rate of return on investment. While there is general agreement among economists that this rate has remained relatively static over long periods in history, there are varied opinions as to what the rate actually is. The weight of opinion is that the long-term average real rate of return on low-risk investments is in the range of 3% to 4%.

Another factor influencing the appropriate discount rate for calculating loss of future earnings is the effect of general increases in productivity. These tend to speed up the rate of growth in wages. An adjustment can be made for this by using a slightly lower discount rate, since the income that the plaintiff would have earned would be enlarged in both nominal and real terms by growth in general productivity. Its present value, therefore, should be commensurately larger.

Prior to 1981, British Columbia courts had to make a finding regarding the appropriate discount rate in each case on the basis of opinion evidence that was often conflicting. To avoid the need for this, section 51 of the *Law and Equity Act*⁴ was passed, allowing standardized rates to be prescribed by regulation. The prescribed discount rates are 2.5% for damages for loss of future earnings and loss of dependency in wrongful death cases, and 3.5% for all other future damages, including cost of future care in personal injury cases.⁵

3. DISTORTION INTRODUCED BY TAXATION OF THE INCOME FROM PERSONAL INJURY AND DEPENDENCY DAMAGE AWARDS

Personal injury damages are characterized as capital receipts by Revenue Canada and are not subjected to taxation.⁶ The income generated by the investment of an award of damages is taxable, however.⁷ If no adjustment is made for income taxation in assessing damages, the fund will fall short before the intended time of exhaustion. In other words, the compensation awarded will be inadequate to cover the full extent of the loss.

4. R.S.B.C. 1979, c. 224.

5. B.C. Reg. 352/81.

6. Revenue Canada, Interpretation Bulletin IT-365R2, "Damages, settlements and similar receipts," para. 2.

7. An exception is made for plaintiffs under 21. Income from the investment of personal injury damages becomes taxable after the end of the tax year in which the plaintiff's twenty-first birthday occurs: *Income Tax Act*, R.S.C. 1971-72-73, c. 63, s. 81(1)(g.1), (g.2).

CHAPTER II: GROSS-UP ASSUMPTIONS

Taxation is an issue in regard to the component of personal injury damages that represents the cost of future care and, in fatal accidents cases, the award for loss of dependency as well as some additional types of losses. Under the current law, it is not necessary to deal with taxation in assessing damages for loss of future income because they are calculated on the basis of gross, *i.e.* before-tax, earnings. Theoretically, damages for lost future income represent loss of earning *capacity*.⁸ The presumption made is that the tax paid on the income from investment of the future income loss portion of the award will approximate the tax that would have been paid on the income, had the plaintiff earned it.⁹

The distorting effect of taxation on awards for costs of future care and on dependency awards can be counteracted by adding an amount to the award. This is the so-called “gross-up.”

B. The Legal Authority for the Gross-Up

1. THE FORMER “GLOBAL AWARD” APPROACH

The issue of gross-ups did not arise before the “analytical” method of assessing damages for personal injury was adopted by Canadian courts in the late 1970's. Until that time, courts generally made what were known as “global” awards, which for the most part did not assign particular amounts to particular items of loss.¹⁰ Certain categories of injuries tended to attract awards of more or less comparable size, without a great deal of consideration being given to the plaintiff's individual circumstances.

A number of influences combined to alter the global approach to assessing personal injury damages. A practice of itemizing amounts awarded for specific heads gradually arose as lawyers became more

8. *The Queen v. Jennings*, [1966] S.C.R. 532; cf. *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 259.

9. This presumption may not be warranted, however, and awarding damages for lost future income on a gross basis may arguably overcompensate the plaintiff. In *Cooper v. Miller*, (1992) 64 B.C.L.R. (2d) 62 at 82 the British Columbia Court of Appeal described the refusal to “gross down” the income loss component for income tax as anomalous in light of the gross-up on the cost of care component, but considered itself obligated to preserve the anomaly by virtue of the authority of *Jennings*, *supra*, n. 8.

10. The heads of damage for which compensation was customarily awarded, as listed in an authoritative nineteenth century case, *Phillips v. S.W. Railway*, (1879) 4 Q.B.D. 406, 407-408, were:

- the bodily injury sustained;
- the pain undergone;
- the effect on the health of the plaintiff, according to its degree and its probable duration as likely to be temporary or permanent;
- the expenses incidental to attempts to effect a cure, or to lessen the amount of injury;
- the pecuniary loss sustained through inability to attend to a profession or business, as to which...the injury may be of a temporary character or may be such as to incapacitate the party for the remainder of his life.

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attuned to the possibilities of using actuarial evidence to demonstrate the magnitude of future losses. Awards tended to grow in size in line with rising costs and incomes in the post-war economy. This led to pressures emanating from both the plaintiffs' and the defendants' camps for more precise valuation. In addition, the appearance of prejudgment interest legislation forced the courts to distinguish between losses arising before and after trial.

2. THE “TRILOGY” IN THE SUPREME COURT OF CANADA

In three decisions handed down in 1978,¹¹ the Supreme Court of Canada established a set of principles for an “analytical” approach to the assessment of damages for personal injury. The so-called “trilogy” cases established the now-familiar classification of heads of damage in personal injury cases into four categories:

1. Special damages (*i.e.*, actual quantified losses);
2. Loss of future earnings;
3. Cost of future care and related expenses;
4. Non-pecuniary loss.

They also held it was proper to approximate the actual loss with respect to each head of damage as closely as possible with the aid of actuarial and economic evidence rather than looking to global awards made to similarly injured plaintiffs, except in regard to non-pecuniary loss. This affirmed a trend that was already evident in Canada, but was still a major development in the law of damages.

The emphasis on mathematical methods and full rather than symbolic compensation begged the question as to what to do about the effect of income tax on awards of damages. In a decision delivered at the same time as the “trilogy,” *Keizer v. Hanna*,¹² the Supreme Court affirmed the existing practice of allowing for the effect of tax in fatal accidents cases. For these, the Court gave its approval both to “grossing down” to arrive at the after-tax income the deceased would have earned, and to grossing up for the effect of tax on the investment of that amount in order that the dependants would not be shortchanged.

11. *Andrews v. Grand & Toy Alberta Ltd.*, *supra*, n. 1; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267.

12. [1978] 2 S.C.R. 342.

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Paradoxically, the leading case in the trilogy, *Andrews v. Grand & Toy Alberta Ltd.*,¹³ held there should be no allowance for tax on income from the investment of either of the lost future income and cost of future care components of the award in a personal injury case. The grounds advanced for disregarding tax in the case of lost future income were that damages were really awarded for loss of earning capacity and thus were capital in nature. In the case of cost of future care, tax effects were said to be mitigated by the deductibility of some medical expenses, but the chief reason for ignoring income tax was the difficulty of calculating the tax burden. Calculations offered on behalf of the plaintiff were described as “giving the illusion of accuracy to what is a wholly speculative projection of future costs.”¹⁴

Despite the apparently firm position taken by the Supreme Court of Canada in the trilogy, it would be some time before the debate surrounding the recognition of the eroding effect of income tax in personal injury cases would be settled.

3. DIFFERENCES BETWEEN PROVINCES IN INTERPRETING THE TRILOGY POSITION ON GROSS-UP

The courts of various provinces interpreted the trilogy in differing ways. The Ontario Court of Appeal took the position that the Supreme Court of Canada had not ruled out gross-ups entirely, but had declined to allow for them in the three cases because a proper evidentiary basis had not been laid. It concluded that a gross-up to take account of future taxation was available with respect to cost of future care in a proper case.¹⁵ Ontario courts followed this and awarded gross-ups on the future care component of the award.¹⁶

The courts of other provinces, including British Columbia, generally interpreted the trilogy as precluding a gross-up for income tax on any aspect of damages in personal injury cases.¹⁷

13. *Supra*, n. 1.

14. *Ibid.*, at 260.

15. *Fenn v. Peterborough*, (1979) 104 D.L.R. (3d) 174 (Ont. C.A.). A gross-up was not made in this case because evidence was not placed before the trial court regarding it.

16. *McErlean v. Sarel*, (1987) 61 O.R. (2d) 396, 42 D.L.R. (4th) 577 (C.A.); *rev'd* in part on other grounds (1985) 32 C.C.L.T. 199 (Ont. H.C.); leave to appeal refused (1988) 63 O.R. (2d) x, 46 D.L.R. (4th) vi (S.C.C.); *Schmidt v. Sharpe*, (1983) 27 C.C.L.T. 1 (Ont. H.C.).

17. *Malat v. Bjornson*, (1980) 19 B.C.L.R. 28 (S.C.); *Leischner v. West Kootenay Power & Light Co.* (1981) 130 D.L.R. (3d) 373 (B.C.S.C.); *Scarff v. Wilson*, (1988) 33 B.C.L.R. (2d) 290 (B.C.C.A.); *MacDonald v. Alderson*, [1982] 3 W.W.R. 385 (Man. C.A.). An anomalous British Columbia decision from this period in which a gross-up was allowed is *Mason v. Mason*, (1988) 31 B.C.L.R. (2d) 92 (S.C.). In *Reekie v. Messervey*, (1989) 36 B.C.L.R. (2d) 316 the three members of the Court of Appeal deciding the case expressed the view that the trilogy did not bar gross-ups altogether, but considered themselves bound by the earlier decision of a five-member court in *Scarff v. Wilson*, *supra*.

4. THE GROSS-UP ISSUE AGAIN IN THE SUPREME COURT

Considerable academic and other criticism was directed at the lack of compensation for the eroding effect of income tax on the cost of future care component. The matter came before the Supreme Court of Canada again in 1989. This time, the Supreme Court dismissed the objection to gross-ups based on the speculative nature of the calculation, and held in *Watkins v. Olafson*¹⁸ that a gross-up should be awarded on the cost of future care component of personal injury damages, provided there is evidence that it is necessary to preserve the award for its intended duration.

C. Alternatives to Gross-Up

1. AMENDMENT OF THE *INCOME TAX ACT*

The need for a gross-up would be eliminated if the income from the investment of dependency awards and the cost of future care component of personal injury damages were non-taxable. A complete exemption from tax for income deriving from the investment of future care funds or dependency awards is nevertheless improbable. Apart from the loss of revenue it would involve, there is no guarantee that the plaintiff will use the fund exclusively for genuine medical needs. Nothing compels the plaintiff to do so.

In its 1987 Report, the Ontario Law Reform Commission recommended that income from the investment of a cost of care award be exempt from taxation. It suggested a plan modelled on the familiar RRSP as a means of sheltering the income, while also encouraging the proper use of the fund.¹⁹ It acknowledged the difficulty of policing such plans to ensure they would not create tax advantages outside those purposes, however.

Another way of eliminating the need for a gross-up in most personal injury cases would be to render all the kinds of future care costs that the courts currently allow in assessing damages deductible from taxable income. This would not be a once-and-for-all solution, however, since the nature of the expenses would change with time, and the taxing

18. [1989] 2 S.C.R. 750.

19. Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (OLRC 88, 1987) 139-140. The extensive work of the Ontario Law Reform Commission in relation to standardized gross-up assumptions has been of great benefit to the Committee. While our conclusions vary somewhat from those of the OLRC, its 1987 Report has been a useful check on our own thinking on many of the same questions.

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authority would still want to preserve control over the extent of the exemption.

As a complete exemption or an expansion of medical tax credits is unlikely, other solutions must be sought.

2. STRUCTURED COMPENSATION

If an award of damages for future loss consisting of compensation payable in instalments at fixed intervals like a structured settlement could be made, so that the capital of the fund belonged to the payer of the compensation and never entered into the plaintiff's hands, the plaintiff would probably not be taxable on the income from the capital.²⁰ This, too, would eliminate the need for a gross-up.

In the absence of legislation specifically enabling it to do so, however, a court cannot make a judgment that is to be paid periodically.²¹ Such legislation has been enacted in Ontario, allowing the court to give a judgment that provides for periodic payments whenever the plaintiff's claim includes a request that the award be grossed up for income tax.²² A bill to empower British Columbia courts to order damages to be paid periodically in personal injury cases was introduced in 1989²³ and reintroduced in 1990,²⁴ but lapsed on dissolution of the Legislative Assembly in 1991. It has not since been reintroduced.

Many consensual settlements are structured to provide for periodic payments, of course. Legislation enabling the court to award structured compensation would be a forward step, though it would have to deal with a number of complexities arising from the need to preserve the value of the compensation and to achieve sufficient security for the plaintiff.

Without such enabling legislation, the courts are left with the gross-up.

20. Interpretation Bulletin IT-365R2: *Damages, settlements, and similar receipts* indicates that Revenue Canada will not treat periodic payments under a structured settlement as being taxable in the hands of the compensated party, and sets out the conditions under which this treatment will be available. Essentially, the insurer or defendant must purchase a single premium annuity designed to produce the periodic payments of compensation, and must remain the beneficiary of the annuity, while also remaining liable to make the periodic payments. The insurer or defendant pays the income tax on the interest element of the annuity. Ownership of the capital is not then considered to pass to the compensated party. It is reasonable to think that a judgment for damages to be paid in periodic instalments could be treated in the same manner.

21. *Watkins v. Olafson*, *supra*, n. 18 at 756-764.

22. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 116.

23. Bill 66, *Structured Compensation Act* (3rd Sess., 34th Parl., 1989).

24. Bill 29, *Structured Compensation Act*, (4th Sess., 34th Parl., 1990).

D. Facts and Assumptions Underlying Gross-up Calculations

1. GENERAL

Gross-up calculations are complex, with many intermediate stages. They are based upon both facts and assumptions. While all of these influence the final figure, they do so to varying degrees. Some factors are specific to the individual case. These relate to the plaintiff's individual characteristics or situation. By definition, they are not amenable to standardized assumptions. Other elements of the calculation can be applied more generally. These are predictions about the future economic and tax climate, and choices of methodology in the calculation itself. It is possible to standardize them, although the validity of the assumptions made will always be open to debate.

2. FACTS SPECIFIC TO THE PARTICULAR CASE

(a) The Plaintiff's Age and Life Expectancy

The present age and life expectancy of the plaintiff are the principal factors in determining how long the fund must subsist. They also influence other aspects of the calculation, such as assumptions about the investments that are appropriate for the fund to hold.

(b) The Plaintiff's Future Care Needs

The nature of the plaintiff's continuing disabilities determines the needs that the fund must meet. The future care costs of some plaintiffs will qualify almost in their entirety as expenses capable of generating tax credits. Others will have little opportunity to claim the benefit of medical and other tax credits and deductions. This variance has a large effect on the size of the gross-up. The availability of medical tax credits can reduce the gross-up figure to nil.

3. ASSUMPTIONS THAT ARE PREDICTIONS ABOUT FUTURE ECONOMIC AND FISCAL CONDITIONS

(a) General

One category of assumptions involved in the gross-up calculation consists of certain predictions about economic and fiscal conditions during the existence of the fund. Every gross-up involves assumptions in relation to: the future state of tax law, future rates of inflation, and the future rate of return on investment.

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(b) Future Inflation Rates

The tendency of inflation is to increase taxation as a proportion of real investment income.²⁵ This effect occurs because inflation enlarges *nominal income* (the actual number of dollars of income a taxpayer receives), and it is nominal income that is taxed. As the inflation rate rises, more and more of the nominal return on investment represents inflation rather than real return. Even if the tax rate is unchanged, real after-tax income will decline.²⁶

Inflation, therefore, cannot be ignored despite the impossibility of pinpointing a particular number as an accurate prediction of future inflation. The choice of an inflation rate is an exercise in divination which can make an enormous difference in the size of the gross-up figure. Without standardization of the assumed rate, this element of the calculation provides much room for prolonged debates between experts, with predictable effects on the duration and cost of court proceedings.

(c) Tax Law

The state of future income tax law is clearly uncertain, but some assumption must still be made regarding the portion of the plaintiff's income that will be taxed, and the deductions and credits that will be available to the plaintiff while the fund is in existence.

It is also necessary to consider how the tax brackets will be situated in the future. As nominal income increases with inflation, the plaintiff may be pushed into a bracket carrying a higher rate of tax. Full indexing of tax brackets for inflation would negate this effect, but existing tax law only provides for indexation of the tax brackets and various personal exemptions at three per cent less than the rate of inflation.²⁷

If the tax law is deemed to continue exactly as it is without periodic adjustments to the tax brackets and other fixed dollar amounts to recognize the effect of inflation, a gross-up for a young plaintiff with a modest income may project an outlandish rate of tax in later life. Results like this are not realistic. Eventually, as taxation consumes an ever-larger

25. See Rea, "Inflation, Taxation and Damage Assessment," (1980) 58 Can. Bar. Rev. 280, 287.

26. For example, if the inflation rate is 0%, the real rate of return is 3% and the tax rate is 50%, the real after-tax yield will be 1.5%. If inflation is 5%, the nominal interest rate will be around 8%. With the same tax rate as before, the nominal after-tax yield would be about 4%, but the real after-tax return would be -1%. The effect is more pronounced as the rate of inflation increases. If inflation is 10%, and the tax rate and real rate of return in the example remain the same, nominal interest rates would hover around 13%. The nominal after-tax yield would be 6.5%, but the real return after tax would drop to -3.5%.

27. *Income Tax Act*, *supra*, n. 7, s. 117.1(1).

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share of real income, resistance could be expected to build up to a point where political considerations lead to tax changes reversing the trend. For this reason, gross-up calculations are often done on the basis that fixed dollar amounts stated in the *Income Tax Act*, such as those delimiting tax brackets, will be “fully inflation-indexed,” or increased in pace with inflation.²⁸

Since nearly any guess would be as good as another as to what form income tax law will take in the future, the usual approach (apart from the indexation issue) is to assume that tax laws will remain the same as at the date of trial.

(d) The Future Rate of Return on Investment

A rate of return on investment is used to predict the amount of income the fund will generate over the period of its existence. The rate of return is calculated with reference to an assumed real rate, which usually coincides with the rate prescribed for calculating the present value of future damages other than lost earnings,²⁹ and the assumed rate of future inflation.

4. OTHER ASSUMPTIONS INVOLVED IN CALCULATING THE GROSS-UP

(a) The Mix of Investments

The proportion of equity to interest-bearing investments influences the level of taxation on the investment income, as income from equity investments enjoys a more favourable tax regime.³⁰

Due to the effect that the investment mix has on the taxation of income from the fund, an assumption about the proportion of interest to dividend income flowing from the fund must be made before a gross-up figure can be calculated.

The kinds of investments that would be appropriate for the fund to hold depend to a considerable extent on the plaintiff's individual circumstances. In order to be realistic, the assumption made regarding the mixture of investments must take account of the need for security as well as capital growth. Risk to the capital of the fund tends to increase

28. However, in *Tucker v. Asleson*, (1991) 62 B.C.L.R. (2d) 78 (B.C.S.C.), *aff'd* without mention of this point (1993) 78 B.C.L.R. (2d) 173 (C.A.) this methodology was disapproved as being too speculative.

29. This rate is set by B.C. Reg. 352/81 at 3.5%.

30. A special tax credit is available for dividend income: *Income Tax Act*, s. 121. Capital gains resulting from the sale of shares are taxed at three-quarters of the rate that would apply if they were interest income: *ibid.*, s. 38(a). They may also be eligible for the lifetime capital gains exemption: *ibid.*, s. 110.6(4).

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with the proportion of equity investments in the fund's portfolio, however. In the majority of cases, a 50-50 or 60-40 split is assumed, with the bulk of the investments in the latter case being interest-bearing.

(b) First and Second Dollar Income and the Tax Rate

(i) General

From the standpoint of Revenue Canada, the source of an individual's income has no bearing on the tax rate: taxable income from all sources is commingled and the rates prescribed by the *Income Tax Act*³¹ for the tax bracket in question are applied to the total sum.³²

Calculating a gross-up, however, involves isolating the effect of a dependency award or the cost of care component of a damages award on the plaintiff's tax liability. The defendant is not required to protect the plaintiff against taxation of income from the investment of other components of the total award. But to determine accurately the amount needed to offset the effect of tax, the presence of any other income cannot be ignored. Since the plaintiff must commingle other income with the income from the cost of care award on his or her tax return, the presence of other income may push the plaintiff into a higher bracket. In order for the gross-up to achieve its purpose of protecting the plaintiff against premature exhaustion of the award, the true burden of taxation must be simulated. This means that the tax rate used in the calculation must approximate as closely as possible the one that may actually be applied to the investment income from the award.

(ii) Commingling Income

One way of approximating the actual tax rate that will be applied is to commingle the investment income from the various components of the damages award that will form the initial investment pool with the plaintiff's other taxable income, and use the average tax rate for the plaintiff's total income. Until recently, gross-up calculations were sometimes done this way in British Columbia.

(iii) "Stacking" of Income

The conventional way of protecting the cost of care award against the danger of grossing up with an assumed tax rate that is too low is to treat the income from sources other than the cost of care component of

31. *Supra*, n. 7.

32. *Ibid.*, s. 117(2).

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the award as “first dollars,” and that from investment of the cost of care component as “second dollars,” so that the second dollars will attract the highest applicable marginal rate. The British Columbia Court of Appeal has now sanctioned the “stacking” of the plaintiff’s income in this manner for the purpose of gross-up,³³ following earlier decisions in other parts of the country.³⁴

While the “stacked” calculation gives the benefit of any doubt concerning the adequacy of the gross-up to the disabled plaintiff, it usually results in a higher gross-up figure than the one reached under the “commingled” calculation. It also has the effect that the more non-award income the plaintiff has, the higher the gross-up is likely to be. Since the tax rate of wealthier individuals, and ones retaining income-earning capacity, is normally higher than that of less wealthy plaintiffs or those with no residual ability to earn income, they will usually receive larger gross-ups.

(iv) What is included in “First Dollar Income”

Stacking income for the purpose of grossing-up begs the question of what kinds of income should be treated as “first dollars.” Normally, a plaintiff would have investment income from the part of the award representing loss of future earnings. If the plaintiff still has some earning capacity, it may be reasonable to assume a certain level of actual earned income as well. The damages awarded for non-pecuniary loss may generate income also.

So-called “collateral benefits,” or payments received under a pre-arranged scheme like a disability pension, individual or group sickness and disability insurance, or a survivor’s benefit under a pension plan, are other examples of income that could be considered “first dollars.”

The jurisprudence on this issue is not settled. What expressions of judicial opinion there are tend towards a wide view. Of course, the more sources of income that are brought into the category, the less is the danger of using too low a marginal rate in the calculation. The other side of the issue, however, is that a tendency towards inclusiveness creates the risk that the defendant will be forced to protect the plaintiff not only against the effect of tax on the cost of care component, but against income tax generally. That is not the purpose of the gross-up.

33. *Cherry v. Borsman*, (1992) 70 B.C.L.R. (2d) 273 (C.A.).

34. E.g., *Fenn v. Peterborough*, *supra*, n. 15; *Nielsen v. Kaufmann*, (1986) 26 D.L.R. (4th) 21 at pp. 34-41; *McErlean v. Sarel*, *supra*, n. 16.

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(c) The Actuarial Technique Used

Two different actuarial techniques can be employed to arrive at a gross-up number. The first is the “life certain” method. It presupposes that payments will be made from the fund over the full period of its intended existence, no more and no less. This period usually coincides with the plaintiff's life expectancy, but may be a shorter period coinciding with the length of time during which the plaintiff is expected to require care.

The other technique is the “survival probability” method. This method of calculation takes account of the probability of the plaintiff surviving to receive each payment, instead of employing an assumption at the outset that the plaintiff will survive to a full life expectancy, or to the end of any other period of given length that may be in question.

The life certain method is somewhat less complex and is more readily grasped by judges, counsel and jurors. The survival probability method, however, is a more sophisticated technique coinciding to a greater extent with accepted actuarial principles. It is also consistent with the method generally used to calculate the future losses themselves.

E. Some Implications of The Lack of Standardized Assumptions

1. CONFLICTING EXPERT EVIDENCE

The present lack of a standardized approach to calculating the gross-up means that courts must continually deal with expert evidence submitted by each side that does not proceed from the same assumptions. The adversarial nature of the process leads inevitably to the defendant introducing an expert report with a lower figure than the one contained in the report submitted by the plaintiff. The reports may coincide with respect to some assumptions, but they can be, and frequently are, widely divergent.

In the litigation process, the validity of expert opinion on an issue is treated as a question of fact. Differing findings on the same issues reflect badly on the administration of justice, but courts are forced to act on the basis of the evidence actually submitted in individual cases.

As a non-expert, the trial judge often has little or no basis on which to make a choice between the conflicting opinions. Numerous judgments simply indicate a preference for one party's report over another, without enunciating a rationale for it. Trying to make findings of “fact” on such

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elusive matters as the rate of inflation many years hence does not enhance the credibility of the courts. The subject-matter of evidence pertaining to the gross-up is difficult to grasp. To the uninitiated observer of the court's performance, it carries an air of greater subjectivity than is actually inherent in the calculations. "Splitting the difference" between the experts' positions, which is sometimes done out of desperation, only worsens this impression.

2. ADDED EXPENSE TO THE PUBLIC

While the experts' opinions on the proper gross-up figure can be put before the court by way of a report, the author of each report will likely be subjected to extensive cross-examination on the assumptions made in it. Evidence on the gross-up can add several days to a trial. What is worse, the evidence is highly repetitive, since the same kinds of assumptions must be made in each case even though the detail varies. This takes up court time that could be used to greater advantage and increases the expense of running the court system.

3. ADDED EXPENSE TO LITIGANTS

The need for litigants to secure expert assistance in obtaining proper estimates of future losses to submit to the court adds to the costs they face. The reports are costly and time-consuming to prepare. They involve extensive consultations with other expert witnesses like the attending physicians and rehabilitation therapists, who supply much of the factual data about the plaintiff's situation that will enter into the calculation.

It is sometimes necessary to prepare more than one report. The trial judge may make findings of fact which overturn the assumptions made in the report prepared for trial. If a report is prepared for the purpose of settlement negotiations which are unsuccessful, a further one may have to be obtained for trial.

In addition to the inevitable expenses associated with preparation of the expert's report on future losses, there is additional cost involved in experts having to attend to justify assumptions underlying their gross-up calculations, and in counsel having to cross-examine the opposing party's expert on them.

F. The Prospect for Standardized Assumptions

1. STANDARDIZATION THROUGH PROFESSIONAL CONSENSUS

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While a substantial degree of uniformity of opinion concerning the steps involved in arriving at a gross-up figure exists among actuaries and others with related expertise, the assumptions made in the calculation are greatly influenced by instructions the expert receives and the sources of information on which the instructions themselves are based. For example, an expert may be instructed by counsel for a plaintiff to calculate the gross-up on the strength of a study of the plaintiff's future care requirements indicating many items that are not eligible for medical tax credits. Another expert, engaged on behalf of the defendant, will probably be instructed according to a different view of future care requirements that would make a much greater allowance for medical tax credits. Given the degree to which the litigation setting in which gross-up calculations are done interferes with the development of a non-casuistic set of assumptions, it is unrealistic to expect that much headway can be made in standardizing gross-up assumptions through professional consensus alone.

Some points on which experts do tend to agree are that:

- The effect of future inflation cannot be ignored. Some rate must be assumed.
- It is unrealistic to assume that the long-term trend for taxation to take up a higher proportion of total personal income will continue indefinitely. At some point, it should probably be assumed that a plaintiff's average tax rate will level off.
- The availability of medically-related tax credits and deductions must be examined closely in each case. Depending on the plaintiff's requirements, they may eliminate the need for a gross-up.³⁵

2. STANDARDIZATION THROUGH JUDICIAL DECISIONS

Decisions of appellate courts provide a limited degree of guidance to experts engaged to calculate a gross-up. The approval given to the "stacked" calculation by the British Columbia Court of Appeal has already been mentioned.³⁶ Some other principles seem to have emerged from the trial and appellate jurisprudence to date:

35. As a result of medical tax credits, the tax liability of some older plaintiffs after the award is invested may actually be lower than it would have been if they had not been injured.

36. *Cherry v. Borsman*, *supra*, n. 33. See "(iii) Stacking of Income," above.

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- “Other income” brought into the income stack as “first dollars” should not include income from the investment of the award for non-pecuniary loss.³⁷
- The mix of investments that the calculation assumes the plaintiff will hold must be one that is appropriate for a prudent investor of the same class as the plaintiff.³⁸
- The tax payable on the “second dollar” income, i.e. the income from the investment of the cost of care award, is considered to be reduced by the extent of medical tax credits available to the plaintiff.³⁹
- The gross-up should be reduced by the amount of tax saved as a result of payments under Part 7 of the regulations under the *Insurance (Motor Vehicle) Act*⁴⁰, but only if those payments relieve the plaintiff of the need to expend investment income from the award on care items.⁴¹
- The fact that the plaintiff must pay legal fees, which will inevitably reduce the portion of the total damages award available for investment, should have no effect on the gross-up. In other words, the governing consideration is the protection of the cost of care component against erosion by tax, and the defendant cannot claim a benefit because the plaintiff must pay legal fees.⁴²
- The tax structure existing at the time of the award, including the partial indexing of tax brackets and exemptions, should be used as the basis for projecting the plaintiff's future tax liability.⁴³

Matters that are technically findings of fact, such as the extent to which an individual plaintiff will be able to claim tax credits and deductions for future care expenses, must be decided case by case. This is also true of assumptions that must be proven through expert evidence as if they were matters of fact. Further guidance will emerge from the higher courts, but it will be slow in coming. Controversy may persist

37. *Scarff v. Wilson*, (1990) 42 B.C.L.R. (2d) 273 (S.C.).

38. *Ibid.*

39. *Morrison v. Hicks*, (1990) 51 B.C.L.R. (2d) 203 (B.C.S.C.).

40. R.S.B.C. 1979, c. 204.

41. *Morrison v. Hicks*, *supra*, n. 39.

42. *Ibid.*

43. *Tucker v. Asleson*, (1991) 62 B.C.L.R. (2d) 78 (S.C.).

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over details of the gross-up calculation for several years before a case on the matter works its way through to judgment on appeal.

3. STANDARDIZATION THROUGH LEGISLATION

Standardization will not result through expert consensus or judicial decision in the foreseeable future. The only remaining possibility is standardization through some legislative method.

Prescribing assumptions by means of a statute, regulation, or rule (or even through a practice direction) would prevent endless re-examination of the basis for a particular assumption in case after case. Expert consensus has no legal force, and both its existence and the rationale underlying it can be attacked by counsel. Parties may argue for a different assumption to be applied for any number of reasons. This is not the case with a legislatively prescribed assumption, which has to be taken as a “given.”⁴⁴ The legislative approach has an obvious precedent in the discount rate prescribed under section 51 of the *Law and Equity Act*.

Of the three approaches to achieving standardization considered so far, legislation holds the most promise for an expedient and workable solution.

G. The Committee's Position

1. THE ROUTE TO STANDARDIZATION

(a) *Universally Applicable Assumptions*

We have reached the conclusion that the law should mandate the use of standardized assumptions for aspects of the gross-up that are not entirely dependent on the facts of individual cases. Into this category fall the assumptions regarding the economic conditions and fiscal regime that will be experienced while the cost of care fund is in existence, and also those relating to the methodology of the calculation.

(i) *Assumptions Varying With the Facts of Particular Cases*

44. For example, the Court of Appeal held in *Cherry v. Borsman*, *supra*, n. 33, that the discount rate established under s. 51(2)(b) of the *Law and Equity Act* is conclusively deemed to result in a fund of damages for future loss that is self-liquidating within the proper amount of time, precluding the admissibility of evidence to the contrary.

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We also conclude that further standardization is possible in connection with some factors that are more dependent on the facts of individual cases, such as the presumed rate of withdrawals from the fund and the availability of tax credits and deductions. In these cases, however, standardization should take a different form. Instead of a hard and fast rule, the law should set out a rebuttable assumption: one that is to be applied unless it is shown by evidence offered by either party to be inappropriate in the circumstances.

(ii) General

The standardized assumptions should be simple and workable. They should not pretend to a precision that is unattainable, having regard to the uncertainties affecting the assessment of damages generally. They should strike a reasonable balance between plaintiffs and defendants, but the principal objective of protecting the future care fund from tax erosion while it has to remain in existence needs to be borne in mind throughout.

H. The Assumptions

1. ASSUMPTIONS REGARDING FUTURE ECONOMIC CONDITIONS AND FISCAL STRUCTURES

(a) Future Tax Laws

(i) General Structure and Rates

The tax structure is a creature of the legislature. This makes it possible to say that every prediction about the state of future tax law is speculative, and choosing between them can only be an arbitrary exercise. Assuming that tax law in the future will be the same as at trial is as valid an assumption as any other, subject to what appears below in connection with indexation of the tax structure for inflation.

(ii) Adjustment of Fixed Dollar Amounts

Most experts favour a calculation that assumes full indexation of tax brackets and exemptions for inflation. The Committee is somewhat divided on this issue, however.

A minority of the Committee hold the view that assuming full indexation detracts from the simplicity achieved by assuming the continuance of the present income tax structure, and should be rejected as an unnecessary complication.

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The majority view is that it is less speculative to assume that the tax structure will change to this extent at least, than to assume it will remain precisely the same. The logical result of making no adjustment for inflation to these fixed dollar amounts is to assume that practically all income would eventually be taxed at the highest marginal rate, even that of low-income earners.

The majority of the Committee believe one of the mandatory standard assumptions should be that all fixed dollar amounts in the *Income Tax Act* change annually at the rate of future inflation. An assumed rate of future inflation is discussed later in this Report.

(iii) Proposed But Unimplemented Tax Law Changes

It is a standard practice for changes to tax law to be announced in advance of their introduction in Parliament in bill form. The announcement is frequently made in a budget speech, but may be contained in a White Paper or other consultative document. Considerable time may elapse before its enactment. This creates a dilemma for those involved in calculating a gross-up. Even if there is a substantial likelihood that a proposed change will be enacted, it is not a certainty. Since the timing of its passage is also uncertain, experts are unsure of the point at which it should be deemed to affect the taxation of the cost of care fund.

The Committee canvassed several solutions to the dilemma. One obvious solution is to apply income tax rules precisely as they exist at the date of trial, even if changes have already been announced. This hardly seems realistic when a proposed change has been formally adopted as an element of fiscal policy. Another is to follow the current practice of tax planning professionals. This would generally permit announced changes to be taken into account, especially if they are made in a budget speech. If “current practice” forms the standard, however, extensive evidence and cross-examination might be involved in establishing what the current practice is at any point in time. This would not help to achieve the ends sought by standardizing the gross-up assumptions. A clear direction as to what proposed changes, if any, should be taken into account, is to be preferred.

Our view is that a proposed change to the income tax structure should be assumed to be part of tax law during the existence of the cost of care fund if, at the date of trial, it has been introduced in Parliament or a provincial legislature, or announced in a budget speech. Since tax policy may evolve between the unveiling of a proposed tax change and the trial of an action, however, it should be open to the parties to rebut

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this assumption by introducing evidence that the proposed change no longer represents government policy.

(b) *The Assumed Rate of Return on Investment*

A standard rate of return on investment would be readily available in the form of an equivalent to the discount rate prescribed under the *Law and Equity Act* for calculating damages for future loss, but we do not think it is satisfactory for purposes of the gross-up. Since it is the nominal rather than the real income of the cost of care award that is taxed, the rate at which taxable income is deemed to be generated must be one that will yield the proper number of nominal dollars. This means that the effect of future inflation must be built into the assumed rate. If it is not, too little income will be assumed, the gross-up will be too small, and the future care fund will be prematurely exhausted.

The prescribed discount rate, representing an authoritative estimate of the long-term real rate of return on investment, can be modified to relate to nominal return by increasing it to reflect the assumed long-term rate of inflation. This procedure is described by the following expression:⁴⁵

$$J = [(1+K) \times (1+R)]-1$$

where: J = assumed rate of investment income
K = assumed rate of future inflation⁴⁶
R = the discount rate prescribed under section 51(2)(b) of the *Law and Equity Act*,

all expressed as decimal values.

45. To arrive at this equation, we consider first that the value of a principal sum P invested at an interest rate J for n time periods is $P(1+J)^n$. J , the nominal interest rate, represents the long-term real rate of return R (which for this purpose must be taken as the rate prescribed by s. 51 of the *Law and Equity Act*) in conjunction with a second factor, namely the rate of future inflation K . Both these rates operate simultaneously on the principal sum P . This can be expressed:

$$P(1+J)^n = P[(1+R)(1+K)]^n.$$

As the terms on each side of the equation are of the same degree, the exponent n may be ignored. Multiplying by the reciprocal of P then yields:

$$1+J = (1+R)(1+K)$$

or

$$J = [(1+R)(1+K)]-1.$$

46. This assumed rate is discussed below.

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We recommend that the standardized gross-up assumptions should specify that the assumed rate of return on investment be derived by means of this equation.

(c) The Assumed Rate of Future Inflation

The Committee has spent much of its time on the matter of how to standardize the prediction of future inflation. Numerous methods were examined.

(i) An Arbitrarily Fixed Rate

The simplest approach is to select an arbitrary rate within a range acknowledged by most experts to be a reasonable estimate of long-term inflation. It would be difficult to dispute a rate selected in this manner, since any prediction of future inflation is speculative. The rate chosen could be subject to periodic review to compare it to observed and anticipated inflation.

(ii) An Interest Rate Benchmark

Another approach is to tie the assumed rate to an external benchmark. The Ontario Law Reform Commission, for example, recommended that the rate of future inflation be taken as the average of the annual changes in the Consumer Price Index over the previous five years, rounded to the nearest half percentage point.⁴⁷ This approach does not commend itself to us, because past rates of inflation are not a reliable measure of future inflation. If this needs any illustration, the experience of the last fifteen years clearly demonstrates how deceptive a guide past inflation rates may be. Between 1978 and 1982 the average annual change in the CPI was 10.3%. Between 1983 and the present, a period of 10 years, the annual rate of change has not exceeded 5.7%.⁴⁸

The yield on long-term government bonds provides another source for a benchmark, since the interest rates on these securities reflects the thinking of many knowledgeable participants in financial markets. The benchmark could be the difference between the yields on current issues of long-term bonds and the prescribed discount rate. This, however, would likely overstate the long-term inflation rate, because government bonds carry a premium representing the currency risk taken by foreign investors and concerns over the federal deficit.

47. *Supra*, n. 19 at 142-143.

48. Statistics Canada, *The Consumer Price Index*, August 1993. Cat. No.62-001, p. 21.

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Another model for a benchmark based on long-term bond yields might be to use the difference between the fixed return on regular Government of Canada bonds and that on the real-return bond series. Government of Canada real-return bonds provide holders with a fixed rate of return in excess of the rate of inflation, measured by the Consumer Price Index.⁴⁹ The difference between the current real rate of return on real-return bonds and the yield on regular long-term government bonds may provide a good indication of future inflation anticipated by bond market investors. It should be noted, however, that while such a technique has the virtue of being based on a consensus of views of sophisticated investors, it is not necessarily the case that the “market view” correctly anticipates future inflation, nor is it the case that the difference between the real rate of return and the nominal rate corresponds exactly to anticipated inflation. This gives rise to the concept of a “Beta factor” which will alter the response of the nominal interest rate to changes in expected inflation.⁵⁰ A further difficulty is that there is no assurance that the Government of Canada will continue to issue the real-return bond series.

(iii) Prediction by Means of a “Beta Factor” Formula

Another means of predicting future inflation we considered at length would be to employ a formula incorporating the expectations about future inflation that are implicit in the circumstances prevailing in financial markets. This formula would incorporate a “beta factor” representing the “sense of the market” about the possibility of movement in inflation. “Beta” might be prescribed in a manner similar to the discount rate, and be reviewed once observed rates of inflation exceed the currently prescribed factor. The formula would take this form:

$$I = \frac{1+B}{1+R} - 1 + b$$

49. See Bank of Canada circular dated 23 September 1992 describing an offering of 4.25% real return bonds maturing 1 December 2021.

50. Economists accept a relationship between nominal interest rates and anticipated inflation in which real rates are constant and a given change in the anticipated rate of inflation will change the nominal interest rate by an equal amount as a simplified starting point in developing a theory of interest. There are a number of considerations, however, which suggest that a change in the nominal rate of interest would not equal a change in the anticipated inflation rate. For example, given that taxes may reduce real rates of return below the *ex ante* or desired value if inflation rates increase, it would be expected that the nominal rate of return would increase by more than the expected increase in the rate of inflation. Furthermore, uncertainty with respect to future inflation may reduce the supply of funds available to the long term bond market, driving yields up. Both of these considerations imply that the difference between nominal yields and the *ex ante* or desired real rate of return would be expected to exceed the rate of inflation. It is also quite possible to describe conditions under which the difference would be less than the rate of inflation.

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where: I = rate of future inflation
B = the long-term yield on high-quality bonds
R = the discount rate prescribed under the *Law and Equity Act*⁵¹
b = “beta,” a measure of the uncertainty inherent in financial markets. Beta could be prescribed by regulation in a similar manner to R. Beta could be positive, negative, or zero.

The role played by beta in the formula is to compel consideration of current and anticipated changes in financial markets. Expert evidence would be needed to establish its value unless the value were prescribed, however. Once it acquired a prescribed value, beta would lose its usefulness unless it were kept under continual, or at least frequent, review. Further guidelines would have to be developed to indicate when a review would be mandatory. Introducing a “trigger” for a review would also require continual monitoring of market conditions. While there is support in economic literature for the use of beta in predicting future market conditions, the Committee concluded for these reasons that the above formula is not a practical alternative for standardizing the assumed future inflation rate. Some members of the Committee also think that using a formula would lend an air of scientific precision to the prediction of future inflation that is simply not attainable.

(iv) Use of A Short and Long-Term Inflation Rate

A further approach is to distinguish between short and long-term rates of inflation. Current rates of inflation would be used to gross up short-term awards, and a long-term inflation rate would be assumed in cases where the cost of care fund must last for a lengthy period. While this initially appears pragmatic, it does not provide a complete solution. The appropriate short-term rate based upon market observation would still have to be proved as a question of fact. The selection of an appropriate long-term rate is precisely the same problem we have been considering here. The classification of a given case as one to which the short or long-term rate should apply would be another potential source of dispute.

(v) The Committee's Conclusion

In keeping with the goal of simplifying the process whereby a court decides on a gross-up figure, we conclude that a specific number should

51. A discount rate is simply the real interest rate used as a divisor to obtain present value, instead of a multiplier to obtain future real value. See the heading “Discounting of Awards to Present Value - A Means of Delivering Future Purchasing Power”, *supra*.

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be adopted as an assumed rate of future inflation. We believe a rate of 4% is appropriate in this regard.⁵² This rate is approximately equivalent to the difference between the yield on regular Government of Canada fixed return bonds and the yield on the 30-year real-return bond.

The degree of arbitrariness involved in selecting a specific rate can be reduced by providing for a periodic review of the number. Something in the nature of a beta factor could be employed to indicate when an adjustment to the assumed future inflation rate is desirable. Such an “economic monitoring factor” would represent the difference between a market benchmark, like the nominal interest yield on long-term Government of Canada bonds,⁵³ and the yield predicted by the assumed rate of future inflation and real return on investment. Given that at any point in time, uncertainty may cause variation in nominal rates of interest (and in the actual real rate of interest, if not in the desired real rate), that there is not a one to one correspondence between anticipated inflation rate changes and those in the nominal interest rate, and that even the most sophisticated investors are not endowed with perfect foresight, the factor would normally be expected to have a non-zero value. The value would also be expected to vary over time.

If the factor had a positive value exceeding a certain margin for an extended period, three years for example, it would be an indication that the assumed future inflation rate was too low. A negative value exceeding the same margin for the same extended period would indicate it should be adjusted downward. The margin would represent the normal price and interest rate fluctuations that can be expected in the overall economy in any interval of time. Our conclusions about such an “economic monitoring factor” and how it would be used appear in the form of Guidelines 15(4), (5) and (6) in Appendix C.

2. ASSUMPTIONS RELATING TO THE METHODOLOGY OF CALCULATION

(a) *The Plaintiff's Marginal Tax Rate*

(i) *“Second Dollar” Rate*

As the overriding objective of the gross-up is to preserve the future care portion of the damages award against tax erosion, the assumed rate of tax should be the highest rate that is likely to apply. This means that

52. For the sake of comparison, it may be observed that the geometric average of annual increase in the consumer price index over the period 1943-1992 is calculated as 4.59%: Canadian Institute of Actuaries, *Report on Canadian Economic Statistics, 1924-1992*, May 1993.

53. Bonds that do not mature earlier than 10 years from the date of issuance are usually considered to be long-term. The interest rates on the face of long-term government and corporate bonds is an indication of the financial community's expectations of future economic conditions.

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the income from the future care portion should be treated as “second dollars,” considered to be taxable after the plaintiff’s other income or “first dollars” have been subjected to tax. In other words, the income from the cost of care fund is “stacked” on top of the first dollar income to determine the applicable marginal tax rate. This is the position under the existing law, and we believe it is correct.

(ii) What First Dollar Income Should Include

If taken to its logical conclusion, the principle of protecting the plaintiff’s future care or dependency loss award against tax erosion would lead to taxable income from every other source being swept into the category of “first dollars.” Indeed, support can be found in a number of judicial decisions for an expansive view of what should constitute first dollars.⁵⁴

While the goal of simulating the actual marginal tax rate that will be applied to the income from the future care fund would suggest a presumption of inclusiveness regarding first dollar income, there are good reasons for making some exclusions. Firstly, the plaintiff’s income from sources other than the cost of care or dependency award is relevant to the gross-up only if it is taxable. Secondly, amounts that are capable of generating taxable income are relevant only if they are likely to do so. In other words, they are only relevant if they are likely to be invested. Thirdly, enlarging the scope of first dollar income means that the wealthier an individual is, the larger the gross-up is likely to be in most cases. That result seems instinctively objectionable to many, even though it can be defended on purely mathematical grounds. This consideration led the Ontario Law Reform Commission to recommend that only the plaintiff’s future earned income and the income from the investment of the award for loss of future earnings should be counted as first dollars.⁵⁵

A minority of the members of this Committee have reached a conclusion on the proper extent of first dollar income similar to that of the Ontario Law Reform Commission, though for somewhat different reasons. They believe that if first dollar income is given any wider scope, plaintiffs will be treated more generously than necessary. They object in particular to the inclusion of collateral benefits, since under current law these must often be ignored in assessing damages for personal injury and

54. *Cherry v. Borsman*, *supra*, n. 33 at 305, citing the remark of Cumming, J. in *Scarff v. Wilson*, (1990) 42 B.C.L.R. (2d) 273, 283 (S.C.) that “a plaintiff with extra independent wealth is in the same position as one with an extra thin skull...;” *Nielsen v. Kaufmann*, *supra*, n. 34 at 38; *Morrison v. Hicks*, *supra*, n. 39 at 307.

55. *Supra*, n. 19 at 145-146.

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wrongful death.⁵⁶ Giving the plaintiff the benefit of the non-deductibility of such income twice over is, in their view, unfair to defendants and in excess of what is needed in most cases to protect the future care award from tax.

The majority of the members consider that the way in which a stream of payments is treated in assessing damages is irrelevant to the gross-up. As the objective is to protect the future care award against tax, the effect that other income will actually have on the plaintiff's tax position must be recognized. The majority view is that, as a general rule, income should be treated as first dollars if it is taxable and its presence is capable of influencing the rate of tax on the income from the investment of the future care award.

All members, however, agree on the following specific exclusions from first dollar income:

- *income from investment of damages awarded to compensate for non-pecuniary losses and pre-trial income loss.* These damages are referable to losses already incurred. They are not awarded with the intention that they will endure for any particular period of time and there is no reason to assume they will remain invested. It is unnecessary to make every presumption against the interests of the defendant.
- *capital amounts acquired by the plaintiff after or as a result of the injury or loss, including insurance proceeds.* While insurance money, if invested, would certainly enlarge the initial investment pool and possibly influence the tax rate, it is largely a matter of personal choice for the plaintiff whether to invest it or use it for another purpose. Paying off a mortgage or other large financial obligation with the cash derived from an accident insurance policy would be a rational and prudent choice for a plaintiff in a sufficient number of cases as to militate against establishing a presumption that it will be invested and produce taxable income. The same considerations apply to income from other after-acquired capital, whether or not its acquisition is related to the injury or loss.

(iii) Non-Deductibility of Collateral Benefits in

56. The so-called "collateral benefits rule" preventing deduction of benefits for which the plaintiff has contracted and paid for in computing loss has been called into question in *Miller v. Cooper* (No. 22860) and other appeals now pending before the Supreme Court of Canada. See Supreme Court of Canada, *Bulletin of Proceedings*, Nov. 5, 1993 at 2025. See n. 9, *supra*, in relation to the British Columbia Court of Appeal decision in *Miller v. Cooper (sub nom. Cooper v. Miller)*. As to the non-deductibility of collateral benefits in assessing damages for wrongful death, see the section below entitled "(iii) Non-Deductibility of Collateral Benefits in Assessing Damages and Section 3(7) of the Family Compensation Act."

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Assessing Damages and Section 3(7) of the Family Compensation Act

Neither the majority nor minority positions on the matter of first dollar income outlined in the preceding section should be taken as an expression of any view on the merits of the current law concerning the treatment of collateral benefits in assessing damages. The majority nevertheless believe that in order to avoid uncertainty, the standardized assumptions should include a statement that first dollar income must be determined without reference to those principles.

Questions may also arise about the effect of section 3(7) of the *Family Compensation Act*,⁵⁷ which expressly prevents the deduction of benefits in the nature of insurance in assessing damages for wrongful death. The term “insurance” in section 3(7) is interpreted very broadly, covering not only life insurance, but also “death benefits” or “survivor's benefits” under public and private pension and superannuation schemes, employee benefit plans, and collective agreements.⁵⁸ It is immaterial whether the benefit stems from a contributory plan or not.⁵⁹

The rationale for not deducting such collateral benefits “in the nature of insurance” from damages in cases under the *Family Compensation Act* is that the benefit of the deceased's prudence should go to the dependents for whom it was intended, not to the tortfeasor. It would be bad policy for the law of damages to discourage breadwinners from making provision for their dependents' well-being in the event of a tragic accident.

The concern about collateral benefits in connection with the gross-up calculation, however, is whether or not they will form part of the initial investment pool and yield taxable income. Not all collateral benefits covered by the term “insurance” in section 3(7) of the *Family*

57. R.B.S.C. 1979, c. 120. S. 3(7) states:

(7) In assessing damages there shall not be taken into account any money paid or payable on the death of the deceased under any contract of assurance or insurance.

The same provision is found in the fatal accidents legislation of the other provinces.

58. *Canadian Pacific Limited v. Gill*, [1973] S.C.R. 654 (Canada Pension Plan benefits); *Muldrew v. Harris*, (1988) 29 B.C.L.R. (2d) 67 (S.C.) (federal public service superannuation plan); *Bates v. Illerburn*, (1976) 70 D.L.R. (3d) 154 (Ont. C.A.); *McCutcheon v. McCutcheon*, (1989) 256 A.P.R. 271 (N.B.Q.B.); *Plachta v. Richardson*, (1974) 49 D.L.R. (3d) 23 (Ont. H.C.) (private pension plans); *Lamont v. Pederson*, [1981] 2 W.W.R. 24 (Sask. C.A.) (death benefit paid by employer under collective agreement).

59. *Lamont v. Pederson*, *ibid.* The test expressed in *Canadian Pacific Limited v. Gill*, *ibid.*, and the English decision it is based on, *Parry v. Cleaver*, [1970] A.C. 1 (H.L.) for what constitutes “insurance” under provisions like s. 3(7) is whether there is an element of risk to some party, e.g. the plan member, the dependent beneficiary, or the benefit payer. The benefit payer may be an insurer, an employer, or the state. The necessary risk element is considered to be present whenever the receipt, amount, duration, or timing of a benefit is dependent on future events, as it is with virtually every pension or employee benefit scheme.

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Compensation Act are paid with the intention they will be invested rather than used for immediate needs.

Section 3(7) has a potential to confuse the matter of non-deductibility of insurance and insurance-like benefits in assessing damages with their treatment in the gross-up calculation. The majority of the Committee believe the standardized assumptions should also make it clear that section 3(7) has no bearing on what is included in a plaintiff's first dollar income.

(b) Allocation of Income Between Interest and Dividends

While the appropriate portfolio varies with the plaintiff's individual characteristics, the initial amount of the plaintiff's investment base and the expected duration of the cost of care fund are more important factors. The analysis can be made simpler by thinking of an allocation between two different types of *income*, dividends and capital gains from the sale of investments on one hand, and interest on the other, rather than a mix of investments. A larger fund can withstand a greater share of risk than a smaller fund, and therefore can retain a larger proportion of dividend-bearing investments. These generally carry more risk than interest-bearing ones. Also, the larger the capital amount of the cost of care fund, the more important it is to hold dividend-bearing investments for the capital growth needed to withstand inflation. Hence, a larger fund will likely derive more dividend income than a smaller one. Beyond a certain point, however, the market risk becomes too great. Prudence dictates that even in a very large fund the volume of dividend income should not exceed 40% of the total income of the fund.

If the cost of care fund is very small, it is unrealistic to assume any substantial proportion of dividend income. In addition to the degree of risk involved in holding equity investments, there are costs associated with managing a fully diversified portfolio. Stockbrokers' commissions must be paid on the acquisition and sale of shares, the tax accounting is somewhat more complicated, and there is generally a need for more continuous assistance in managing the portfolio than with interest-bearing securities.

We have devised what we believe is a workable standardized assumption regarding the proportion of dividend to interest income in a cost of future care fund. The proportion would be assumed to vary with the size of the fund.

Where the damages for future loss are below a threshold of \$200,000, all the income would be assumed to be interest. This threshold

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is not entirely arbitrary. A fund of at least \$250,000 is usually required for diversified portfolio management. We chose to set the threshold for assuming some dividend income at \$200,000 rather than \$250,000 to avoid as often as possible the problem of circularity that could arise from small awards, grossed up on the basis that there will only be interest income, being pushed over the threshold for assuming dividend income by the addition of the gross-up itself.

Where the damages for future loss are between \$200,000 and \$800,000, the percentage of total income assumed to consist of interest would be determined by this formula:

$$I = 100 - \frac{A - \$200,000}{15,000}$$

where: I = the proportion of income that is assumed to be interest, expressed as a percentage and rounded to the nearest whole number

A = the total value of the damages awarded for future loss

Income other than the proportion represented by “I” would be assumed to consist of dividends, although it might include some capital gains as well from the sale of investments. Capital gains do not figure in the formula because they are not received periodically like dividends, and may be eligible for capital gains exemption in any event. When a plaintiff cannot claim exemption for capital gains deriving from the fund, the rate of tax on the taxable portion is similar to the rate applicable to dividends.⁶⁰ For the sake of simplicity and ease of application, the formula relates variation in “I” to \$15,000 “steps” or increments in fund size between \$200,000 and \$800,000. The \$15,000 steps correspond to 1% increments in the proportion of income represented by interest.

If A is greater than \$800,000, the proportion of total investment income represented by interest (“I”) would be assumed to be 60% of total investment income. A 60/40 split between interest-bearing securities and equities is generally considered to be a prudent combina-

60. The defendant should not benefit from the fact that some of the plaintiff's investment income represents exempt capital gains. The lifetime capital gains exemption is an asset of the plaintiff. The fact that a plaintiff has assets other than the damages award does not reduce a defendant's liability in other situations. A loss has been incurred, regardless of a particular plaintiff's relative ability to withstand it vis-à-vis other possible plaintiffs.

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tion for an individual with funds of this size who lacks special investment expertise.

(c) The Method of Calculation

In the majority of cases, the differences between the results obtained from the two actuarial methods are fairly insignificant. The life certain method has the advantage of greater simplicity. A report prepared on the basis of the survival probability method may be more costly. There are several approaches to the survival probability model, some of which are highly detailed. It is not essential to employ the most elaborate version of this technique, however.

The survival probability method is theoretically more correct and corresponds to the manner in which the magnitude of the dependency or future care award itself is calculated, before the gross-up is done. If one of the simpler versions of the survival probability method were prescribed for use in connection with the gross-up, the potential difference in cost between the two methods could be minimized. The committee favours this approach.

(d) Procedure for Grossing Up Reduced Awards

Where an award is reduced by the court because of some degree of contributory fault on the part of the plaintiff, or on the part of the deceased in the case of a claim under the *Family Compensation Act*, there are two ways in which the gross-up could be calculated. They do not produce the same result.

The first way is to gross up the award as if it had not been reduced by the court, and then reduce the gross-up by the same percentage the court used to reduce the plaintiff's damages. The result may be seriously distorted, since the relationship between the size of the award and the size of the gross-up is not linear. The higher level of income that the unreduced award would produce would bring higher rates of tax into the calculation than the ones that will actually apply to the income from the reduced award the plaintiff receives. Accordingly, the gross-up could be unnecessarily large.

The second approach is to gross-up the reduced award the plaintiff actually receives. This is the correct procedure, as it simulates the tax rate that will actually apply to the income from the award. The standardized assumptions should mandate this approach.

3. REBUTTABLE PRESUMPTIONS

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(a) Rate of Withdrawals from the Fund

The anticipated pattern of withdrawals from the future care fund can exert a considerable influence on the size of the gross-up. The pattern will vary with the care needs of the individual plaintiff. The nature of some disabilities means that large expenditures will have to be made early in the fund's existence for one-time purchases of equipment. This will necessarily dip into the capital and reduce the level of investment income subsequently earned, while in other cases expenditures will be relatively regular in both timing and amount, and consist mostly of income at the early stages. This allows for greater capital growth and therefore greater return. In still other cases, the greater portion of the care expenditures may be required late in the fund's duration, when the plaintiff's condition may be expected to deteriorate. In such cases, the plaintiff will have had the opportunity to maximize the return from the fund in the meantime.

If major expenditures are required early in the life of the fund, a smaller gross-up will be needed than in cases where more capital can be left in the fund to generate income.

Given the great variation that is possible in the rate of withdrawal and the fact that inflation tends to increase the size of withdrawals, the only sensible approach to standardization here is to assume equal withdrawals in amounts of real dollars throughout the duration of the fund. Since an inflexible assumption of equal real withdrawals would be inappropriate for some plaintiffs and defendants, it should be open to either party to rebut the assumption by showing that it is more realistic to assume some other pattern of withdrawals in a particular case.

(b) Availability of Income Tax Benefits

(i) General

Since the extent to which a plaintiff can take advantage of medical and other tax credits and deductions ("income tax benefits") will vary greatly from case to case, it would be unrealistic to attempt to impose a standardized assumption concerning their availability. It is possible, however, to cut down on the variation between experts' reports by standardizing the "givens" in this area. We recommend that the items listed as qualifying for an income tax benefit in an expert report prepared for the plaintiff be taken as exhaustive unless a party adverse in interest submits a report containing a different list, or notifies the plaintiff that the list is disputed. Such notification should be given not later than 30 days after receipt of the plaintiff's report. If the other party does not

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actually submit an expert report, particulars of the dispute concerning the list should be provided within that period. In order to meet special circumstances, the court should have the power to extend or abridge the 30-day period, or dispense with notification of intent to dispute the list.

(ii) *Availability of Income Tax Benefits When Fault is Apportioned*

While the availability of tax credits is not amenable to standardization, it is possible to standardize the treatment of tax credits when the damages award is reduced because of an apportionment of some degree of fault to the plaintiff. Without an adjustment to take account of the reduced award, tax benefits can have a distorting effect. If the amount of the total award for future loss that would be spent on items qualifying for tax benefits is assumed to be the same even though damages are reduced, the effect of income tax may be underestimated and the gross-up may be too small. This is because more income will be assumed to be spent on items that give rise to a credit or deduction than in fact may be the case. With a reduced fund for future care, the plaintiff may decide to forego certain expenditures and therefore also the tax benefit which those expenditures would have attracted.

The solution is that where an apportionment of fault results in a reduction of damages, the gross-up should be calculated on the assumption that expenditures qualifying for income tax benefits will be proportionally reduced. Since the pattern of expenditure that can be expected in individual cases may not conform to this assumption, however, it should be open to rebuttal.

(iii) *Where Tax Benefits Exceed Income from the Award*

In a few cases, a plaintiff may be able to claim enough tax benefits to offset the tax otherwise payable on second dollar income during all or part of the period the future care award is meant to cover. If it can be demonstrated that this will occur, there should be either no gross-up or a reduced one, since tax will not erode the award while the offset persists.

In some cases, there could be an excess of income tax benefits over tax liability on the second dollar income. It is possible to treat this excess in more than one fashion.

The first way of dealing with the excess would simply be to ignore it. This would mean that the gross-up would be calculated at the rate of tax that would apply to the second dollar income if the plaintiff's tax liability on first dollar income were unaffected by the excess. Since the

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excess of tax benefits would actually serve to offset some of the tax on first dollar income as well, this calculation is unrealistic. It would result in a larger gross-up than is actually needed.

The other alternative is to calculate the gross-up on the basis that the plaintiff's tax liability on first dollar income is reduced by the excess of income tax benefits over second dollar income. This would be more in accordance with the plaintiff's actual tax position, but the mathematical result could be a notional gross-up with a negative value.⁶¹

The significance of the negative value would be that the plaintiff has been placed in a better tax position than if there had been no injury. The fact of the injury would have produced a tax advantage. Theoretically, the plaintiff's future losses would be lessened by an amount equivalent to the amount of the notional gross-up and the overall damages award should be reduced proportionately. The defendant's liability would be correspondingly lessened. While defensible in terms of strict logic, this scenario in which catastrophic injury is transformed into an advantage reducing the plaintiff's entitlement to damages would probably strike most litigants as absurd.

The compromise position, which we recommend, would treat an excess of income tax benefits over tax on second dollar income as reducing the tax liability on the plaintiff's first dollar income. The gross-up would be calculated accordingly, but could not be expressed as being less than zero. This is fair to both plaintiffs and defendants, and avoids the appearance of absurdity.

(c) Tax Changes

The rebuttable presumption we propose for dealing with announced but unimplemented changes in tax law was described earlier in the section on future tax law.

I. Mandating the Use of the Standard Assumptions

1. THE MEANS OF IMPLEMENTATION

61. The gross-up is actually the present value of the increase in income tax due to the fact that the plaintiff has income from the investment of the future care award. If the tax only increases in some years and decreases in others, the excess of the present value of increases over the present value of decreases is the amount of the gross-up. If the present value of the decreases exceeds that of the increases over the period during which the award is being used up, the value of the gross-up would be negative.

CHAPTER II: GROSS-UP ASSUMPTIONS

Once the nature of the standardized assumptions has been settled, it is necessary to consider how they should be implemented. Since the assumptions affect the plaintiff's right to recover damages and conclusively deem certain states of fact to exist, they are not easily characterized as being purely procedural. Legislation is probably required to compel their use. It is doubtful whether there is authority in the *Court Rules Act*⁶² as it now exists to implement them as rules of court.

If all the detail were placed in an Act the benefit to be had from subjecting the assumptions to regular review might be lost. Due to the vagaries of the legislative timetable, there could be a lengthy delay between a recommendation of the Chief Justice's review committee and its enactment. For this reason, it is desirable to put the standard assumptions into effect by means that are more amenable to periodic review, such as a regulation, rule of court, or even a practice directive.

Practice directives can be issued directly from the court without having to reach the Cabinet agenda like regulations and rules of court, and so would be the fastest means of promulgating the standard assumptions and of modifying them when necessary.⁶³ They are normally issued on a single occasion and not reprinted, however. They have little circulation outside the legal profession. Rules of court, on the other hand, are published by the Queen's Printer.

Yet there are certain advantages in placing the authority for the standard gross-up assumptions in the *Law and Equity Act*, where the provision requiring the use of the prescribed discount rate is located. Both provisions relate to the same subject-matter, namely techniques of assessing damages for future loss. They would also be similar in form. Grouping them together in the same Act is a logical step. For these reasons, we favour implementation of the standard gross-up assumptions through regulations made under the *Law and Equity Act*. The advantages that could be had by placing the enabling legislation in the *Court Rules Act* can be preserved by publishing the regulations as a schedule to the Supreme Court Rules in order to obtain wider distribution. This is our recommendation.

A draft amendment to the *Law and Equity Act* to provide the necessary regulation-making authority appears in Appendix B.

62. S.B.C. 1989, c. 22. Ss. 1(1) and (2) authorize rules of court governing the "conduct of proceedings," including "practice and procedure" and "the means by which particular facts may be proved and the mode by which evidence may be given." While some of the standard assumptions relate to the means of proving facts, not all do.

63. Rules of court are brought into effect through regulations passed by the Lieutenant Governor in Council: *Court Rules Act*, *supra*, n. 62, s. 1(1).

2. VARIATION OR EXCLUSION OF THE STANDARD ASSUMPTIONS BY THE PARTIES

An issue that remains to be decided is whether parties should be free to agree that the gross-up should be calculated on some other basis than the standard assumptions. In one sense, this may seem to defeat the purpose of standardization. Other aspects of the law of damages are subject to agreement between the parties, however. A plaintiff is under no obligation to claim for every possible head of damage, and a defendant may consent to a judgment for an amount acceptable to both parties, but less than what the court might otherwise award. This does not make the general law of damages any less binding in the absence of agreement.

In our view, the parties should be able to agree to vary or exclude the application of the standard assumptions to their case. Without such agreement, the standard assumptions should be followed in every gross-up report that is prepared for submission to the court.

3. NOTICE OF EVIDENCE TO REBUT STANDARD ASSUMPTIONS

When a party intends to introduce evidence to show why one of the rebuttable assumptions should not be applied, the other party ought to have timely notice of it. If this is not the case, much of the benefit from standardizing the gross-up assumptions, namely the ability of the parties and the court to proceed on a predictable course without inordinate expense and delay, would be lost. A departure from the standard should only be made for the best of reasons. The court will not have the advantage of full argument on the matter from both sides unless the side that opposes the departure from the general rule has an adequate opportunity to consult its own experts and prepare evidence and argument. For the sake of uniformity with the general requirement of 60 days' written notice currently required by the Rules of Court for notice of an intention to introduce expert evidence,⁶⁴ we recommend a similar requirement for notice of intention to rebut a standard assumption.

J. Keeping the Standard Assumptions Under Review

While we believe the standard assumptions we recommend in this Report will yield equitable results in the overwhelming majority of cases, it would be foolish to cast them in stone forever. There ought to be a means of reviewing them periodically to ensure that they are in keeping

⁶⁴ *Rules of Court*, R. 40A.

CHAPTER II: GROSS-UP ASSUMPTIONS

with evolutionary changes in the economic, legal and social climate. The manner in which the discount rate under section 51 of the *Law and Equity Act* was originally set, namely by the Chief Justice of the Supreme Court with the aid of an informal advisory group,⁶⁵ provides a flexible and inexpensive model for a review mechanism. We recommend that the Chief Justice be empowered to establish an advisory committee to monitor the operation of the standard assumptions and the way they are applied, and to recommend changes when required.

Some of the standardized assumptions are more likely than the statutory discount rate to be overtaken by economic changes, however. This is particularly true in relation to the assumed rate of future inflation. In order to ensure that the standard assumptions remain realistic and so that the economic monitoring factor continues to serve its purpose, the advisory committee needs to examine its behaviour once during each year. The committee should conduct its review at a point in the year when the developments that usually influence the economy, such as the federal budget, have already become manifest. In light of these considerations, May of each year would be an appropriate time to examine the economic monitoring factor to determine if an adjustment is advisable.

K. Draft Guidelines Embodying the Standard Assumptions

Our conclusions regarding the way in which the gross-up should be standardized are presented in the form of the draft guidelines in Appendix C.

65. *Ibid.*, s. 51(2). See also McEachern, C.J.S.C., (1982) 40 *The Advocate* 552.

A. The Management Fee as an Element of a Damages Award

Among the Committee's terms of reference is the matter of determining the appropriate size of a management fee allowed as part of the damages for future loss in personal injury and (sometimes) in wrongful death cases. The term "management fee" is used relatively loosely. As used in the cases, it refers to the cost of investment counseling or accounting services as well as full discretionary management of a fund by a third party.

The reason why courts occasionally award management fees is that if the plaintiff is forced to pay for investment assistance from the awards for cost of care and loss of future earnings, those funds will be exhausted prematurely. The projected cost of the management assistance is therefore added to the damages so that the fund will subsist for the required length of time.¹ Unlike the gross-up, management fees are allowed with respect to the awards for both cost of future care and the loss of future earning capacity.² Research conducted on behalf of the Committee indicated that while principles were developing in the case law with respect to the circumstances in which a management fee should be allowed, there appeared to be little uniformity in the size of management fees in relation to the total award for future loss. The basis for arriving at a particular amount was rarely stated adequately.

Award of a management fee is not automatic. A case for it must be made out.³ The leading case is *I.C.B.C. v. Mandzyuk*,⁴ in which the Supreme Court of Canada upheld an award of a management fee to a quadriplegic plaintiff who, though mentally unimpaired, lacked the education and ability to invest the future loss award so as to produce the necessary income needed for lifetime care. The Supreme Court held that a management fee should be awarded when a plaintiff is unable to manage his or her affairs or lacks the ability to invest the fund to produce the required return for the fund to be self-sustaining for the proper length of time. It laid down a requirement for a factual basis to support a claim for a management fee. Specifically, the evidence must show:

- a necessity for management assistance;

1. Cooper-Stephenson and Saunders, in *Personal Injury Damages in Canada* (1981) 324, maintain that while the Supreme Court treated management fees as an independent head of damage, they may also be considered merely as further living expenses that the plaintiff would not have had to incur, but for the injury.

2. *Watkins v. Olafson*, [1989] 2 S.C.R. 750.

3. *I.C.B.C. v. Mandzyuk*, [1988] 2 S.C.R. 650, 36 B.C.L.R. (2d) 371; *aff'd* (sub nom. *Mandzyuk v. Vieira*) (1986) 2 B.C.L.R. (2d) 344 (C.A.).

4. *Ibid.*

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- a necessity for investment advice in the circumstances;⁵
- the expected cost of these services.

The Supreme Court did not go as far as the majority in the British Columbia Court of Appeal, which stated in its judgment in *Mandzuk* that “most people would need professional advice” to manage a large fund for a lifespan of care. This difference between the judgments highlights an unresolved problem. It is whether or not a fee should be allowed to a plaintiff who has normal intelligence and ability, but who lacks investment experience. Some courts have taken the position that anyone can buy bonds and guaranteed investment certificates without assistance, so no fee is required for a plaintiff in this category. Others have awarded nominal sums to allow for some initial investment planning and accounting services.

Some members of the Committee have the impression that in the hope of increasing damages plaintiffs sometimes seek excessive management fees on a scale corresponding to the fees charged by renowned managers of very large pension funds. It is unnecessary to engage managers of such unusual ability and experience to invest a fund for an individual plaintiff, even if full discretionary portfolio management is required.

The Committee also recognizes, however, that virtually all plaintiffs who are awarded damages for future loss extending over long periods will have to pay custodial fees to a trust company. Most will need investment advice at the outset at least, as well as some accounting assistance. This raises the question whether there should be a minimum management fee.

B. Alternatives to the Management Fee

As higher returns are obtainable with professional fund management, there is a potential for over-compensation.⁶ It has been suggested that any need for management fees can be eliminated by using a slightly higher discount rate to offset the higher returns that can be obtained by professional fund management.⁷ The legislation providing for the statutory discount rate does not specify whether it refers to a 3.5% return net of investment advice or management costs, or an equivalent rate of

5. In *Mandzuk* the Supreme Court of Canada did appear to distinguish between a “management fee” and an “investment counselling fee,” but it is clear that its reasoning applied to both and the distinction in terminology is not found in most of the case law.

6. Cooper-Stephenson, *ibid.*, n. 63 at 325. See also the dissenting judgment of Esson, J.A. in *Mandzuk* at 2 B.C.L.R. (2d) 363.

7. Cooper-Stephenson, *ibid.*

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return before any such advice or assistance is paid for. The British Columbia Court of Appeal held in *Cherry v. Borsman*,⁸ however, that the mandatory use of the statutory discount rate precludes consideration of possible over-compensation arising from the fact that a professionally managed fund may actually bring a higher rate of return.

If the fund is relatively small but is intended to last for several decades, placing the capital into a life annuity may be a more economical way to ensure its integrity than investing it through an individually managed account. Management charges can be minimized in this way, but as some portion of the capital must still be invested separately as a hedge on inflationary erosion of the purchasing power of the annuity income, it is not necessarily a complete solution.

As it is not logical to award damages on the basis of a self-liquidating fund unless the fund can be preserved for the necessary length of time, it is appropriate to allow a management fee where the plaintiff would otherwise be unable to invest the fund properly in order to achieve this result. Much court time could nevertheless be saved if the amount of the fee could be readily linked to the amount and duration of the award for future loss, without the need for re-inventing the wheel through evidence and argument in each case.

C. Levels of Management Fees

It appears to us that the most logical way to standardize the appropriate range for a management fee is to set different levels of fees, depending on the degree of assistance the plaintiff requires. We propose a four-level classification, as follows:

- Level 1 - The plaintiff requires only a single session of investment advice and the preparation of an investment plan at the beginning of the period the award is to cover.
- Level 2 - The plaintiff will require an initial investment plan and a review of the investment plan approximately every five years throughout the duration of the award.
- Level 3 - The plaintiff will need management services in relation to custody of the fund and accounting for investments on a continuous basis.

8. (1992) 70 B.C.L.R. (2d) 273 (C.A.).

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Level 4 – The plaintiff will require full investment management services on a continuous basis, including custody of the fund, accounting, and discretionary responsibility for making and carrying out investment decisions. Such a plaintiff is likely to be mentally incapacitated or otherwise incapable of managing personal financial affairs.

Classification of fee levels in this manner allows distinct ranges of fees to be developed.

D. Management Fee Tables

By examining the actual fees charged by trust companies for providing the services pertaining to each level in the 4-level classification, it is possible to develop tables correlating the fee to be allowed as part of the damages in individual cases with the amount and duration of the overall award for future loss. Tables for Levels 2, 3 and 4 fees (Tables A, B, and C, respectively) are set out in the Schedule to the draft guidelines in Appendix C.

The fee for Level 1 is set simply at \$1,000. This is an estimate of the average cost of single-session investment counseling.

The Level 2 fees shown in Table A represent the present value of such a \$1,000 fee expended at five-year intervals throughout the period of the award, rounded to the nearest hundred dollars.

Tables B and C showing the Level 3 and 4 fees are configured somewhat differently. They correlate the fee to be allowed, as a percentage of the future loss award, with the amount of that award and its intended duration. This is because the fees charged by trust companies and other providers of investment services for long-term management are usually based on the amount of the fund being managed. The tables assume that the fund is at least \$250,000, since this is usually the minimum accepted for full investment account management.

E. Other Matters Concerning Management Fees

1. EVIDENTIARY BASIS FOR AWARD OF A MANAGEMENT FEE

Introducing the Level 1 standard fee raises the issue whether there should be an award of at least this nominal amount in every case. While the overwhelming majority of plaintiffs will require at least a minimum

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level of investment advice, there will be cases in which plaintiffs retain all the skills necessary to manage their future loss awards without any assistance whatsoever. The defendant should not be burdened even with a token management fee if it is not strictly necessary to preserve the award. In most cases, it will not be difficult for the plaintiff to establish the likelihood that cost will be incurred to obtain the proper level of investment assistance. For these reasons, we do not recommend a change in the law with respect to the need for an evidentiary basis for a management fee.

2. BLENDED MANAGEMENT FEE AWARDS

(a) General

There may be some cases in which a Level 4 management fee may be required for only a portion of the time the cost of care fund is in existence. For example, a plaintiff recovering slowly from injuries requiring lengthy rehabilitative treatment may be completely unable in the early stages to take on the task of making investment decisions, but eventually will be able to do so. Another case in which it might be inappropriate to award a Level 4 management fee applicable to the entire period of the fund's existence would be one in which a minor plaintiff requires lifetime care, but retains full mental capacity. While still a minor, the plaintiff would not have the legal capacity to make and carry out investment decisions, but that situation could change completely once the plaintiff reached majority.

Cases like these may be rare, but when they arise the court should have the freedom to award a management fee appropriate to the particular situation, rather than being constrained to make an award at only one level. The Committee gave consideration to a formula for apportioning fees at more than one level, but ultimately decided in favour of leaving the matter to the court's discretion.⁹

(b) Cases Involving Fund Management by the Public Trustee

9. The formula for blending management fees at different levels that the Committee considered was:

$$MF\% = L3\% + [(L4\% - L3\%) \times A4 / AW]$$

where MF% = the management fee for the blended award
AW = the total award period in years
A4 = the number of years for which level 4 management fees are needed
L3% = the appropriate Level 3 management fee determined under Rules 2 and 3
L4% = the appropriate Level 4 management fee determined under Rules 2 and 3.

MF%, L3% and L4% are all expressed as percentages of the total award for cost of future care. While not mandated by the guidelines, use of this formula would still be open to the court.

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Where management of the plaintiff's award rests with the Public Trustee's Office for part or all of the period the award is meant to cover, a management fee must be awarded in an amount sufficient to meet the fees the Public Trustee is required to charge. Obviously, those fees may change over the course of time. As the court cannot know what fee scales may apply in the future, a reasonable solution is to set the management fee award with reference to the scale of fees in effect at the time of trial.

If the Public Trustee will not be managing the fund for the entire period it is meant to cover, the court should also be able to incorporate into the management fee award an amount at the appropriate level to take account of the portion of the time when the Public Trustee's Office is not involved.

3. REVIEW OF THE MANAGEMENT FEE GUIDELINES

Investment account managers change fee scales periodically. In order to ensure that the standardized fee amounts conform to changing reality, a process for review of the fee guidelines and tables is essential. The process already described for reviewing the standard gross-up assumptions is adaptable to these as well. Accordingly, we recommend that the Chief Justice of the Supreme Court be empowered to establish an advisory committee to review and recommend changes to the guidelines and fee amounts.

4. IMPLEMENTATION

The same means could be used to enact the management fee guidelines as would be used to implement the guidelines relating to the income tax gross-up calculation.

CHAPTER IV

CLOSING OBSERVATIONS

Assessing damages for future loss can never be a matter of absolute precision. It will always be one of educated guesswork, using whatever information is at hand. The income tax gross-up is an element of future loss compensation which the court is not in a position to address without the aid of expert evidence. Unfortunately, the extensive efforts of counsel and expert witnesses to put the best information before the court in connection with the gross-up has become counter-productive. The additional cost and court time arising from the sophistication of income tax gross-up calculations, and from the inevitable disputes over the validity of the assumptions they are based on, are untenable in the long term. Yet it would be equally untenable to fail to offset to any extent the eroding effect of income tax on long-term compensation awarded to victims of catastrophic injury, or to family members who have lost a relative on whom they are economically dependent.

The standard assumptions we propose in this Report represent, on the one hand, a compromise between the need for uniformity in the ways in which the gross-up is calculated and management fees are set, and fairness to individual plaintiffs on the other. If they remain somewhat complex, it is because we have tried to make them flexible enough to meet most individual situations. We prefer to err on the side of fairness, rather than simplicity.

Devising a solution to the dilemmas posed by the tax gross-up requires more than one kind of expertise. The varied professional backgrounds of the Committee's membership allowed several distinct perspectives to bear on the task. As a Committee, we have benefited from the insight and knowledge of each member. We have appreciated the opportunity to assist in useful reform of a technically difficult and troublesome area of the law.

We are hopeful that the guidelines set out in this Report will bear fruit in terms of reduced cost, more efficient use of expert evidence, and, at least to some degree, greater public satisfaction with the civil justice system. To that end, we urge their rapid implementation.

APPENDIX A

TERMS OF REFERENCE OF THE SPECIAL ADVISORY COMMITTEE

A. The Committee will consider the extent to which it is possible and desirable to standardize the assumptions which are relevant to

(1) the calculation of a “gross-up” of

(a) the future care portion of a personal injury award, or

(b) an award for loss of dependency in a fatal accident case

to adjust for the impact of taxation of income generated by the award, and

(2) the provision of a “management fee” as part of an award.

If the Committee concludes that it is possible and desirable to standardize the assumptions it shall proceed as described below.

B. If the Committee concludes that standardization with respect to the gross-up calculation is desirable, but is possible only if certain assumptions applicable to the calculation of all awards in personal injury and fatal accident cases that are based on future losses are also standardized, the Committee may consider and make recommendations concerning those additional assumptions.

C. The Committee will identify the variables that will affect the gross-up calculation or the provision of a management fee and determine which of the variables

1. depend on the facts of individual cases and the evidence led to establish them, or

2. should not depend on the facts of individual cases nor vary from case to case.

D. The Committee will consider those variables in the second group and recommend a fair and balanced set of assumptions to fix their content.

APPENDIX A: TERMS OF REFERENCE

- E. The committee will consider ways of making the assumptions easy to apply in practice including the possibility of their incorporation in tables, algorithms and computer programs, and make appropriate recommendations or, if possible, devise the tools for this purpose.
- F. The Committee will consider and make recommendations concerning the most appropriate legal technique of mandating the use of the assumptions.
- G. The Committee will consider the need for a periodic review of the assumptions and the best way to constitute a review and implement any necessary revisions.

APPENDIX B

DRAFT ENABLING LEGISLATION

Law and Equity Act Amendment Act, 1994

1. The *Law and Equity Act* is amended by adding the following as section 51.X:

51.X (1) The Lieutenant Governor in Council may, by regulation, establish guidelines governing

- (a) the manner in which income tax must be taken into account in establishing appropriate compensation, and
- (b) the manner and circumstances in which compensation for advice and assistance in the investment and management of an award (management fee) is to be given

in a proceeding where a claim is made under the *Family Compensation Act* or for damages for personal injury.

(2) Without limiting subsection (1), guidelines established under it may

- (a) establish standardized assumptions that may be designated to be presumptions of fact that
 - (i) are irrebuttable, or
 - (ii) may be rebutted in particular circumstances,
- (b) establish guidelines to be observed in applying the assumptions,
- (c) establish two or more levels of management fee and the service associated with each,
- (d) set out criteria to be observed in the award of management fees,
- (e) stipulate the amount of a management fee, either absolutely or with reference to a formula or a table of values,
- (f) provide procedures to keep the operation of the assumptions and guidelines under review.

(3) Guidelines established under this section must be published as a schedule to the *Supreme Court Rules* made under the *Court Rules Act*.

(4) The Lieutenant Governor in Council must not establish a guideline under this section except on the recommendation of the Attorney General after the Attorney General has consulted with the Chief Justice of the Supreme Court.

APPENDIX C

INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

Part 1 – General

Definitions

1. In these guidelines:

“award for future loss” means every element of an award

- (a) based on a personal injury claim, or
 - (b) made under the *Family Compensation Act*
- except
- (c) the portion of an award intended to compensate for non-pecuniary losses,
 - (d) the portion of an award intended to compensate for pecuniary loss arising before trial, including past income loss, or
 - (e) the portion of an award that is a **management fee**,

“award value” means the amount of an **award for future loss** plus the amount of any **gross-up** added to the award.

“Canada life tables” means the most recent life tables for Canada published by Statistics Canada,

“care award” means the portion of a judgment for personal injuries that is intended to compensate for expenses of future care,

“dependency award” means the portion of a judgment made under the *Family Compensation Act* that is intended to compensate for loss of dependency,

“gross-up” means an amount added to an **award for future loss** to adjust for the impact of taxation of income generated by the award,

“income award” means the portion of a judgment for personal injuries that is intended to compensate for, or is determined with reference to, a loss of future earnings because of partial or total loss of income earning capacity,

“management fee” means an amount described in paragraph 11(1),

“plaintiff” means the party to be compensated.

APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

Application

2. (1) Subject to subparagraph (3) and any directions given under subparagraph (6), an expert report concerning a **gross-up** that is submitted to the court must conform to these guidelines.

(2) Subject to subparagraph (3), an award of a **management fee** must conform to these guidelines.

(3) Parties may agree to vary or exclude these guidelines.

[See Report at page 46]

(4) Subject to subparagraph (5), the assumptions and rules set out in these guidelines, to the extent that they address matters that would otherwise require findings of fact by the court, constitute irrebuttable presumptions.

(5) The assumptions set out in paragraphs 4(3), 7 and 10(4) constitute presumptions that may be rebutted by evidence, but any party that intends to lead such evidence must give notice of that intention not less than 60 days before trial unless the court otherwise orders.

[See Report at page 47]

(6) Where the calculation of a **gross-up** involves a consideration of the taxation laws of a jurisdiction other than Canada or a province or territory of Canada, the court may, on application by a party, give directions respecting the application of these guidelines as the facts of the case may require.

Part 2 – Income Tax Gross-up

Form of gross-up

3. A **gross-up** must be expressed as a dollar amount.

Future tax laws

4. (1) Subject to subparagraphs (2) and (3), income tax laws applicable in the future are assumed to be the same as those in force at the time of trial.

[See Report at page 27]

APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

(2) All fixed dollar amounts in the income tax laws are assumed to change annually at the rate of future inflation established under paragraph 8.

[See Report at page 28]

(3) A change in the income tax laws that, at the time of trial, has been introduced or announced in a budget speech in the Parliament of Canada or a provincial legislature, although not yet implemented or in force, is assumed to be part of the income tax laws applicable in the future.

[See Report at page 28]

(4) The presumption in subparagraph (3) may be rebutted by proving that the unimplemented change no longer represents taxation policy of the government of Canada or a province.

[See Report at page 29]

Investment income

5. (1) An **award for future loss** is assumed to generate investment income at a rate determined by the following formula:

$$J = ((1+K) \times (1+R)) - 1$$

where

“**J**” means the assumed rate of investment income,

“**K**” means the assumed rate of future inflation established by paragraph 8,

“**R**” means the discount rate prescribed under section 51(2)(b) of the *Law and Equity Act*, and

“**J**”, “**K**” and “**R**” are all expressed as decimal amounts.

[See Report at page 30]

APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

(2) The investment income generated by an **award for future loss** is assumed to be derived from interest and dividends of Canadian corporations. The proportion of the income that is assumed to be derived from interest must be determined with reference to the following rules:

Rule A: In these Rules:

“**I**” means the proportion of income that is assumed to be interest, expressed as a percentage and rounded to the nearest whole number,

“**A**” means the total value of the **award for future loss**,

Rule B: Where **A** is \$200,000 or less, **I = 100%**,

Rule C: Where **A** is between \$200,000 and \$800,000,

$$\mathbf{I = 100 - ((A - \$200,000) / \$15,000)}$$

Rule D: Where **A** is \$800,000 or greater, **I = 60%**.

[See Report at page 40]

Tax rate

6. (1) A **gross-up** for a **care award** or a **dependency award** must be calculated on the basis that the taxable portion of the earnings of the award is taxed at the marginal rate or rates applicable after the taxation of all of a **plaintiff's** first dollar income amounts.

[See Report at page 35]

(2) For the purposes of subparagraph (1) a **plaintiff's** “first dollar income amounts” must be ascertained with reference to the following rules:

Rule A: subject to Rules C and D, an amount derived from any source that attracts income tax in the hands of the **plaintiff** forms part of the **plaintiff's** first dollar income amounts,

APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

Rule B: without limiting Rule A and for greater certainty, the following amounts form part of the **plaintiff's** first dollar income:

- (a) investment income that is assumed to be generated under paragraph 5(1) on the **income award** portion of the judgment,
- (b) taxable income from capital and investments owned before the **plaintiff's** injury or dependency loss,
- (c) a stream of payments attracting tax that is received after or as a result of the injury or dependency loss,
- (d) the **plaintiff's** likely future income from employment,

Rule C: the following amounts do not form part of the **plaintiff's** first dollar income amounts:

- (a) investment income assumed to be generated by the **care award** or **dependency award** portion of the judgment,
- (b) potential income from a capital amount acquired by the **plaintiff** after or as a result of the injury or dependency loss including
 - (i) insurance proceeds paid as a lump sum, and
 - (ii) the portion of an award intended to compensate for non-pecuniary losses,

[See Report at page 35]

Rule D: Whether or not an amount forms part of a **plaintiff's** first dollar income must be determined without reference to section 3(7) of the *Family Compensation Act* or the principles concerning the deduction of collateral benefits in personal injury cases.

[See Report at page 37]

Withdrawals

7. It is assumed that withdrawals from the fund created by a **care award, dependency award** or **income award** will occur in equal real amounts.

[See Report at page 42]

Future inflation

8. The rate of general price inflation predicted to occur over the period for which an **award for future loss** is intended to provide compensation is assumed to be 4.0% per annum.

[See Report at pages 30, 34]

Calculation of gross-up

9. (1) A **gross-up** calculation must be carried out using the actuarial style of calculation known as the **survival probability method** in conjunction with the **Canada life tables**.

[See Report at page 41]

(2) In subparagraph (1) “**survival probability method**” means the method under which:

- (a) the projected withdrawals from a fund in each future year are discounted to reflect the probability of survival to that year of
 - (i) in the case of a claim under the *Family Compensation Act*, the plaintiff and the deceased, and
 - (ii) in any other case, the plaintiff, and
- (b) the withdrawals, discounted for survival prospects, exhaust the **award value** (adjusted for investment income on the declining balance and taxes on that income) over the period for which the costs of future care, lost dependency, or other loss could potentially endure.

[See Report at page 41]

(3) Where an award is to be reduced because of contributory fault attributable to the **plaintiff** or, in the case of a claim under the *Family Compensation Act*, to the deceased, any **gross-up** of the award must be calculated with reference to the reduced amount.

Tax benefits

10. (1) Where any part of an **award for future loss** is based on a projected expenditure for goods or services that would result in an income tax benefit to the **plaintiff** in the form of a deduction or credit (including a credit arising under section 118.2 of the *Income Tax Act* (Canada)) the value of that benefit, adjusted for the actuarial survival probability, must be taken into account in calculating the **gross-up**.

(2) An expert report respecting a **gross-up** of an **award for future loss** must set out a list that expressly identifies the items which, for the purposes of the calculations, have been treated as attracting an income tax benefit described in subparagraph (1).

[See Report at page 43]

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(3) The list of items identified, in an expert report prepared for the **plaintiff**, as those which attract an income tax benefit described in

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subparagraph (1) is deemed to be accepted by all parties as exhaustive and conclusive unless a party who is adverse in interest

(a) submits an expert report that embodies a different list of items, or

(b) otherwise notifies the **plaintiff** that the list is disputed along with particulars of the dispute

no later than 30 days after receiving the **plaintiff's** expert report unless the court otherwise orders.

[See Report at page 43]

(4) Where an **award for future loss** is intended to compensate for items that attract a tax benefit described in subparagraph (1) but the award is reduced because of the **plaintiff's** contributory fault, for the purposes of calculating the **gross-up** it is assumed that the portion of the award that will be spent on items that attract an income tax benefit is proportionally reduced.

[See Report at page 43]

(5) Where the value of income tax benefits described in subparagraph (1) exceeds tax otherwise payable on the investment income that is assumed to be generated under paragraph 5(1) on the award, the excess may be regarded as reducing the **plaintiff's** tax liability on first dollar income amounts and taken into account in calculating the **gross-up**, but the **gross-up** may not be reduced to a negative value through the operation of this subparagraph.

[See Report at page 44]

Part 3 – Management Fees

Management fee

11. (1) Where a court considers it necessary or appropriate in the circumstances, the court may include in an **award for future loss** an additional amount for the purpose of enabling the **plaintiff** to obtain advice and assistance in the investment and management of the award over the **management period**.

(2) In this Part “**management period**” means the time from the trial of a proceeding to

(a) in the case of an **award for future loss** that includes an award intended to provide compensation throughout the lifetime of the **plaintiff**, the end of the predicted life of the **plaintiff**, determined with reference to the **Canada life tables**.

(b) in the case of a **dependency award**, the time at which the dependency would have been expected to cease if the facts

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giving rise to the claim for compensation had not occurred,
and

- (c) in any other case, the time on which calculations are based
within which the fund created by the award is intended to be
exhausted,

or such earlier time as the facts of the case may require,

Levels of management fee

12. (1) An award of a **management fee** must be stated in terms of a level described in subparagraph (2).

(2) There are four levels of **management fee** as follows:

Level 1: an amount sufficient to purchase a single session of counselling and the preparation of an investment plan by a professional investment counsellor at the commencement of the **management period**.

Level 2: an amount sufficient to purchase a session of counselling, and the preparation of an investment plan by a professional investment counsellor at the commencement of the **management period** and for its periodic review during the **management period**.

Level 3: an amount sufficient to provide the **plaintiff**, on a continuing basis throughout the **management period**, with management services in relation to the custody of and accounting for investment of the **award value**.

Level 4: an amount sufficient to provide the **plaintiff**, on a continuing basis throughout the **management period**, with full investment management services in relation to the **award value** including custody and accounting services and delegated responsibility for making and carrying out investment decisions.

[See Report at page 52]

(3) Where the court makes an award of a **management fee** at level 3 it may make an additional award of a **management fee** at level 1 or level 2.

(4) Where the court determines that an award of a **management fee** at level 4 is appropriate for only a portion of the **management period**, the court may make an award of **management fees** that incorporates such elements of levels 1 to 4 as the facts of the case may require.

[See Report at page 53]

(5) Where the Public Trustee will be responsible for the management of the **award value** for any part of the **management period**,

- (a) the **management fee** for that part must be determined with reference to the scale of fees for the services of the Public Trustee that is in force at the time of trial, and
- (b) for the balance of the **management period**, the court may make an award of **management fees** that incorporates such elements of levels 1 to 4 as the facts of the case may require.

[See Report at page 54]

Amount of management fee

13. The amount of a **management fee** must be determined in accordance with the following rules:

Level 1: the amount of a level 1 **management fee** is \$1,000.

Level 2: the amount of a level 2 **management fee** is the amount set out in Table A in the Schedule to these guide-lines for the applicable **management period**.

Level 3 and Level 4:

Rule 1: the **management fee** is a percentage of the **award value**.

Rule 2: the percentage of the award applicable in a particular case is the percentage set out in Table B or Table C in the Schedule where the row and column referable to the **award value** and the **management period** intersect.

Rule 3: Table B must be used for Level 3 **management fees** and Table C must be used for Level 4 **management fees**.

Rule 4: Interpolation is permitted where the **award value** or the **management period** falls between two values in Table B or Table C.

Rule 5: Where the intersection of the **award value** and the **management period** falls outside the range of values provided in Table B or Table C, the amount of the **management fee** must be the subject of individual valuation.

[See Report at page 52]

Criteria

14. In determining whether or not, and at what level, a **management fee** should be awarded the court must consider all relevant factors including:
- (a) the **award value**,
 - (b) the duration of the **management period**,
 - (c) the age of the **plaintiff**,
 - (d) the money-management and investment skills possessed by the **plaintiff**, and
 - (e) the extent to which the **plaintiff** may be impaired in the management of his or her affairs.

Part 4 – Review

Review of guidelines

15. (1) The Chief Justice of the Supreme Court will establish an advisory committee with respect to these guidelines.

(2) The advisory committee will be chaired by the Chief Justice or the nominee of the Chief Justice and, subject to subparagraph (4), will meet at the call of its chair.

(3) It is the function of the advisory committee to monitor the operation and application of the guidelines and to make recommendations for any changes or additions to them that may improve their operation or better achieve their aims.

[See Report at pages 47, 55]

- (4) In May of each year the advisory committee must meet
- (a) to evaluate the behaviour of the economic monitoring factor and, if appropriate, conduct a review of the predicted rate of general price inflation established under paragraph 8 with recommendations for a revised rate if required, and
 - (b) consider the values expressed as dollar amounts in paragraph 5(2) in the light of price inflation that has occurred since they were last established, with recommendations for revised values if required.
 - (c) consider the scales and amounts of **management fees** established under paragraph 13 and the Schedule with recommendations for revisions if required.

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(5) The economic monitoring factor referred to in sub-paragraphs (4)(a) and (6) is derived as follows:

$$EMF = \frac{(1 + B)}{(1 + I) \times (1 + r)} - 1$$

where

“**EMF**” means the economic monitoring factor,

“**I**” means the assumed rate of future inflation established under paragraph 8,

“**B**” means the yield rate, as published in the most recent issue of the quarterly Bank of Canada Review, for Government of Canada marketable bonds that mature no earlier than 10 years from the date of publication,

“**r**” means the discount rate prescribed under section 51(2)(b) of the *Law and Equity Act*,

“**I**”, “**B**”, “**r**” and “**EMF**” are all expressed as decimal amounts.

(6) The behaviour of the economic monitoring factor is evaluated according to the following rules:

Rule 1: Where the **EMF** has, for 3 or more consecutive years, had a positive value of an absolute magnitude greater than 0.10 it is appropriate to consider recommending an upward adjustment of **I**.

Rule 2: Where the **EMF** has, for 3 or more consecutive years, had a negative value of an absolute magnitude greater than 0.10 it is appropriate to consider recommending a downward adjustment of **I**.

Rule 3: In any case not within Rule 1 or Rule 2, no adjustment of **I** is indicated.

[See Report at page 34]

(7) Any recommendations made by the advisory committee, whether pursuant to subparagraph (4) or otherwise must be transmitted by the Chief Justice of the Supreme Court to the Attorney General along with the Chief Justice's personal recommendations concerning action on them.

APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES

**APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES
SCHEDULE**

SCHEDULE

Management Fee Tables
(See Appendix C, para. 13)

Table A - Management Fees - Level 2					
Management		Management		Management	
Period (Years)	Fee	Period (Years)	Fee	Period (Years)	Fee
1	\$1,200	28	\$4,500	55	\$5,900
2	\$1,400	29	\$4,600	56	\$5,900
3	\$1,600	30	\$4,700	57	\$5,900
4	\$1,700	31	\$4,700	58	\$5,900
5	\$1,900	32	\$4,800	59	\$6,000
6	\$2,100	33	\$4,900	60	\$6,000
7	\$2,200	34	\$4,900	61	\$6,000
8	\$2,400	35	\$5,000	62	\$6,000
9	\$2,500	36	\$5,100	63	\$6,100
10	\$2,700	37	\$5,100	64	\$6,100
11	\$2,800	38	\$5,200	65	\$6,100
12	\$2,900	39	\$5,200	66	\$6,100
13	\$3,100	40	\$5,300	67	\$6,100
14	\$3,200	41	\$5,300	68	\$6,200
15	\$3,300	42	\$5,400	69	\$6,200
16	\$3,400	43	\$5,400	70	\$6,200
17	\$3,500	44	\$5,500	71	\$6,200
18	\$3,600	45	\$5,500	72	\$6,200
19	\$3,700	46	\$5,500	73	\$6,300
20	\$3,800	47	\$5,600	74	\$6,300
21	\$3,900	48	\$5,600	75	\$6,300
22	\$4,000	49	\$5,700	76	\$6,300
23	\$4,100	50	\$5,700	77	\$6,300
24	\$4,200	51	\$5,700	78	\$6,300
25	\$4,300	52	\$5,800	79	\$6,300
26	\$4,400	53	\$5,800	80	\$6,300
27	\$4,500	54	\$5,800	81	\$6,400

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Table B - Management Fees - Level 3

	Management Period - Years																											
	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29								
\$20000	28	31	33	36	38	41	43	46	48	51	53	55	58	60	63	65	67	69	71	73								
\$30000	27	30	33	35	38	40	43	45	47	49	52	54	56	59	61	63	65	67	69	71								
\$40000	27	29	32	34	37	39	42	44	46	48	51	53	55	57	60	62	64	65	67	69								
\$50000	26	29	31	34	36	39	41	43	45	47	49	52	54	56	58	60	62	64	65	67								
\$60000	26	28	30	33	35	38	40	42	44	46	48	50	52	54	57	59	60	62	64	65								
\$70000	25	27	30	32	35	37	39	41	43	45	47	49	51	53	55	57	59	60	62	63								
\$80000	25	27	29	32	34	36	38	40	42	44	46	48	50	52	54	56	58	59	61	62								
\$90000	24	27	29	31	33	36	38	40	42	43	45	47	49	51	53	55	57	58	60	61								
\$100000	24	26	28	31	33	35	37	39	41	43	45	46	48	50	52	54	56	57	59	60								
\$120000	23	26	28	30	32	35	36	38	40	42	44	46	47	49	51	53	55	56	58	59								
\$140000	23	25	27	30	32	34	36	38	39	41	43	45	47	48	50	52	54	55	57	58								
\$160000	23	25	27	29	31	34	35	37	39	41	43	44	46	48	49	51	53	54	56	57								
\$180000	23	25	27	29	31	33	35	37	39	40	42	44	45	47	49	50	52	53	55	56								
\$200000	22	24	27	29	31	33	35	36	38	40	42	43	45	46	48	50	51	52	54	55								
\$220000	22	24	26	28	30	32	34	36	38	40	41	43	44	46	47	49	50	51	53	54								
\$240000	22	24	26	28	30	32	34	36	37	39	41	42	44	45	47	48	49	50	52	53								
\$260000	22	24	26	28	29	31	33	35	37	38	40	42	43	44	46	47	48	49	50	52								
\$280000	22	23	25	27	29	31	33	34	36	38	39	41	42	43	45	46	47	48	49	50								
\$300000	21	23	25	27	28	30	32	34	35	37	39	40	41	42	44	45	46	47	48	49								
\$320000	21	23	25	26	28	30	31	33	35	36	38	39	40	42	43	44	45	46	47	48								
\$340000	21	23	24	26	27	29	31	32	34	35	37	38	39	41	42	43	44	45	46	47								
\$360000	21	22	24	25	27	29	30	32	33	35	36	38	39	40	41	42	43	44	45	46								
\$380000	20	22	23	25	27	28	30	31	33	34	36	37	38	39	41	42	43	44	45	45								
\$400000	20	21	23	25	26	28	29	31	32	34	35	36	38	39	40	41	42	43	44	45								
\$420000	19	21	23	24	26	27	29	30	32	33	35	36	37	38	39	41	41	42	43	44								
\$440000	19	21	22	24	25	27	28	30	31	33	34	35	36	38	39	40	41	42	42	43								
\$460000	20	22	24	25	27	28	29	31	32	33	35	36	37	38	39	40	41	42	42	43								
\$480000		22	23	25	26	28	29	30	31	33	34	35	36	38	39	40	40	41	41	42								
\$500000			23	25	26	27	28	30	31	32	33	35	36	37	38	39	40	41	41	41								
\$520000				24	25	27	28	29	30	32	33	34	35	36	38	38	39	40	41	41								
\$540000					25	26	27	29	30	31	32	33	35	36	37	38	39	39	40	40								
\$560000						26	27	28	29	31	32	33	34	35	37	37	38	39	40	40								
\$580000							26	28	29	31	32	33	34	35	36	37	38	39	39	39								
\$600000								28	29	30	31	33	34	35	36	37	37	38	39	39								
\$620000									29	30	31	32	33	34	35	36	37	38	39	39								
\$640000										30	31	32	33	34	35	36	37	37	38	38								
\$660000											31	32	33	34	35	35	36	37	38	38								
\$680000												32	33	33	34	35	36	37	37	37								
\$700000													32	33	33	34	35	36	37	37								
\$720000														32	33	34	35	35	36	37								
\$740000															33	33	34	35	36	37								
\$760000																33	34	35	35	36								
\$780000																	33	34	35	36								
\$800000																		34	35	35								
\$820000																			34	35								
\$840000																				35								
\$860000																												
\$880000																												
\$900000																												

The value in the table is the management fee,
expressed as a percentage of the award value

**APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES
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Table B - Management Fees - Level 3

Management Period - Years

31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50		
75	77	79	80	82	84	86	87	89	90	92	93	95	96	98	99	100	102	103	105	108	\$2000
73	75	77	78	80	82	83	85	86	88	90	91	92	94	95	96	98	99	100	102	103	\$3000
71	73	74	76	78	80	81	83	84	86	87	89	90	91	92	94	95	96	98	99	100	\$4000
69	71	72	74	76	77	79	80	82	83	85	86	87	89	90	91	92	94	95	96	97	\$5000
67	69	70	72	74	75	77	78	80	81	82	84	85	86	87	89	90	91	92	93	94	\$6000
65	67	68	70	71	73	74	76	77	79	80	81	82	84	85	86	87	88	89	90	91	\$7000
64	66	67	69	70	72	73	74	76	77	78	80	81	82	83	84	85	86	87	88	89	\$8000
63	65	66	68	69	71	72	73	74	76	77	78	79	80	81	82	83	84	85	86	87	\$9000
62	63	65	66	68	69	71	72	73	74	75	76	77	78	80	81	81	82	83	84	84	\$1000
61	62	64	65	67	68	69	70	71	73	74	75	76	77	78	79	79	80	81	82	82	\$2000
60	61	63	64	66	67	68	69	70	71	72	73	74	75	76	77	78	78	79	79	80	\$3000
59	60	61	63	64	65	66	67	68	69	70	71	72	73	74	75	76	76	77	77	78	\$4000
58	59	60	61	63	64	65	66	67	68	69	70	71	72	73	74	74	75	75	76	76	\$5000
56	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	72	73	73	74	74	\$6000
55	56	57	58	60	61	61	62	63	64	65	66	66	67	68	69	70	70	71	71	72	\$7000
54	55	56	57	58	59	60	61	61	62	63	64	65	65	66	67	68	68	69	69	70	\$8000
53	54	55	56	57	58	59	59	60	61	62	63	63	64	65	66	66	67	67	68	69	\$9000
52	53	54	55	56	57	57	58	59	60	61	61	62	63	63	64	65	65	66	67	67	\$1000
50	51	52	53	54	55	56	57	58	59	59	60	61	61	62	63	63	64	65	65	66	\$1500
49	50	51	52	53	54	55	56	57	57	58	59	59	60	61	61	62	63	63	64	64	\$2000
48	49	50	51	52	53	54	55	55	56	57	58	58	59	60	61	61	62	62	63	63	\$2500
47	48	49	50	51	52	53	54	54	55	56	57	57	58	58	59	60	60	61	61	62	\$3000
46	47	48	49	50	51	52	53	54	54	55	56	56	57	57	58	59	59	60	60	61	\$3500
46	47	48	49	50	51	51	52	53	53	54	55	55	56	56	57	58	58	59	59	60	\$4000
45	46	47	48	49	50	50	51	52	52	53	54	54	55	55	56	57	57	58	58	59	\$4500
44	45	46	47	48	49	50	50	51	51	52	53	53	54	54	55	56	56	57	57	58	\$5000
43	44	45	46	47	48	49	49	50	51	51	52	53	53	54	54	55	55	56	57	57	\$5500
43	44	45	46	46	47	48	49	49	50	51	51	52	52	53	53	54	55	55	56	56	\$6000
42	43	44	45	46	47	47	48	49	49	50	51	51	52	52	53	53	54	54	55	56	\$6500
42	42	43	44	45	46	47	47	48	49	50	50	51	51	52	52	53	54	54	55	56	\$7000
41	42	43	43	44	45	46	47	47	48	49	49	50	50	51	51	52	52	53	53	54	\$7500
41	41	42	43	44	45	45	46	47	48	48	49	49	50	50	51	51	52	52	53	53	\$8000
40	41	42	43	43	44	45	46	46	47	48	48	49	49	50	50	51	51	52	52	53	\$8500
40	41	41	42	43	44	44	45	46	47	47	48	48	49	49	50	50	51	51	52	52	\$9000
39	40	41	42	43	43	44	45	45	46	47	47	48	48	49	49	50	50	51	51	52	\$9500
39	40	41	41	42	43	44	44	45	45	46	47	47	48	48	49	49	50	50	51	51	\$1000
39	39	40	41	42	43	43	44	44	45	46	46	47	47	48	48	49	49	50	50	51	\$10500
38	39	40	41	41	42	43	43	44	45	45	46	46	47	47	48	48	49	49	50	50	\$11000
38	39	39	40	41	42	42	43	44	44	45	45	46	46	47	47	48	48	49	49	50	\$11500
37	38	39	40	41	41	42	43	43	44	44	45	45	46	46	47	47	48	48	49	49	\$12000
37	38	39	39	40	41	42	42	43	43	44	44	45	45	46	46	47	47	48	48	49	\$12500
37	37	38	39	40	41	41	42	42	43	44	44	45	45	46	46	47	47	48	48	49	\$13000
36	37	38	39	39	40	41	41	42	43	43	44	44	45	45	46	46	47	47	48	48	\$13500
36	37	37	38	39	40	40	41	42	42	43	43	44	44	45	45	46	46	47	47	48	\$14000
35	36	37	38	39	39	40	41	41	42	42	43	44	44	45	45	46	46	47	47	48	\$14500
35	36	37	37	38	39	40	40	41	41	42	43	43	44	44	45	45	46	46	47	47	\$15000

**The value in the table is the management fee,
expressed as a percentage of the award value**

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Table C - Management Fees - Level 4

		Management Period - Years																				
		10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	
\$25000		59	65	70	76	81	87	92	97	103	108	113	118	122	127	131	136	140	144	148		
\$30000		57	63	68	73	79	84	89	94	99	104	109	113	117	122	126	130	134	138	142	145	
\$35000		55	61	66	71	76	81	86	90	95	100	104	108	112	117	121	125	128	132	135	139	
\$40000		54	58	63	68	73	78	82	87	91	95	100	104	108	111	115	119	122	126	129	132	
\$45000		52	56	61	66	70	75	79	83	87	91	95	99	103	106	110	114	117	120	123	126	
\$50000		50	54	59	63	68	72	76	80	83	87	91	94	98	101	105	108	111	114	116	119	
\$55000		49	53	57	61	66	70	73	77	81	85	88	91	95	98	101	105	107	110	113	115	
\$60000		47	51	55	59	64	68	71	75	78	82	85	89	92	95	98	101	104	106	109	112	
\$65000		46	50	54	58	61	65	69	72	76	79	83	86	89	92	95	98	100	103	105	108	
\$70000		44	48	52	56	59	63	67	70	73	76	80	83	86	89	91	94	97	99	102	104	
\$75000		43	47	50	54	57	61	64	67	71	74	77	80	83	85	88	91	93	96	98	101	
\$80000		42	46	49	53	56	60	63	66	69	72	75	78	81	84	86	89	91	94	96	98	
\$85000		41	45	48	52	55	59	62	65	68	71	74	76	79	82	84	87	89	92	94	96	
\$90000		41	44	47	51	54	57	60	63	66	69	72	75	77	80	82	85	87	90	92	94	
\$95000		40	43	46	50	53	56	59	62	65	68	71	73	76	78	81	83	85	87	90	92	
\$1,00000		39	42	45	49	52	55	58	61	63	66	69	71	74	76	79	81	83	85	88	90	
\$1,05000		38	41	45	48	51	54	57	60	62	65	68	70	73	75	77	80	82	84	86	88	
\$1,10000		37	41	44	47	50	53	56	58	61	64	67	69	71	74	76	79	81	83	85	87	
\$1,15000		37	40	43	46	49	52	55	57	60	63	65	68	70	73	75	77	79	82	84	86	
\$1,20000		36	39	42	45	48	51	54	56	59	62	64	67	69	71	74	76	78	80	82	84	
\$1,25000		35	38	41	44	47	50	53	55	58	60	63	65	68	70	73	75	77	79	81	83	
\$1,30000		35	38	41	43	46	49	52	55	57	60	62	65	67	69	72	74	76	78	80	82	
\$1,35000		34	37	40	43	46	49	51	54	56	59	61	64	66	68	71	73	75	77	79	81	
\$1,40000		34	37	40	42	45	48	51	53	56	58	61	63	65	67	70	72	74	76	78	80	
\$1,45000		33	36	39	42	45	48	50	52	55	57	60	62	64	67	69	71	73	75	77	79	
\$1,50000		33	36	39	41	44	47	49	52	54	57	59	61	63	66	68	70	72	74	76	78	
\$1,55000			35	38	41	44	47	49	51	54	56	59	61	63	65	67	69	71	73	75	77	
\$1,60000				38	41	44	46	49	51	53	56	58	60	62	65	67	69	71	73	75	78	
\$1,65000				41	43	46	48	51	53	55	58	60	62	64	66	68	70	72	74	76	78	
\$1,70000					43	45	48	50	53	55	57	59	61	64	66	68	69	71	73	75	77	
\$1,75000					45	47	50	52	55	57	59	61	63	65	67	69	71	72	74			
\$1,80000						47	50	52	54	56	58	60	62	64	66	68	70	71	73			
\$1,85000							50	52	54	56	58	60	62	63	65	67	69	71	72			
\$1,90000								52	53	55	57	59	61	63	65	66	68	70	71			
\$1,95000									53	55	56	58	60	62	64	65	67	69	70			
\$2,00000										53	55	56	58	59	61	63	65	66	68	69		
\$2,05000											55	57	59	61	62	64	65	67	69			
\$2,10000												56	58	60	61	63	65	66	68			
\$2,15000													58	59	61	62	64	65	67			
\$2,20000														58	60	61	63	65	66			
\$2,25000															59	61	62	64	65			
\$2,30000																60	62	63	65			
\$2,35000																	61	63	64			
\$2,40000																		63	64			
\$2,45000																				63		
\$2,50000																					63	

The value in the table is the management fee,
expressed as a percentage of the award value

**APPENDIX C: INCOME TAX GROSS-UP AND MANAGEMENT FEE GUIDELINES
SCHEDULE**

Table C - Management Fees - Level 4

Management Period - Years

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	
149																				\$20,000
142	146	149																		\$30,000
136	138	141																		\$40,000
129	131	134	137	139	142	144	146	149												\$50,000
122	124	127	129	132	134	136	138	140	142	144	146	148	149							\$60,000
118	121	123	125	127	130	132	134	136	138	140	141	143	145	147	148					\$70,000
114	117	119	121	123	126	128	129	131	133	135	137	139	140	142	144	145	147	148		\$80,000
111	113	115	117	119	121	123	125	127	129	131	132	134	136	138	139	141	142	144	145	\$90,000
107	109	111	113	115	117	119	121	123	125	126	128	130	131	133	135	136	137	139	140	\$1,000,000
103	105	107	109	111	113	115	117	118	120	122	124	125	127	128	130	131	133	134	136	\$2,000,000
101	103	105	107	109	111	112	114	116	118	120	121	123	124	126	127	129	130	132	133	\$3,000,000
99	101	102	104	106	108	110	112	114	115	117	119	120	122	123	125	126	128	129	130	\$4,000,000
96	98	100	102	104	106	108	109	111	113	115	116	118	119	121	122	124	125	126	128	\$5,000,000
94	96	98	100	102	103	105	107	109	111	112	114	115	117	118	120	121	122	124	125	\$6,000,000
92	94	96	97	99	101	103	105	106	108	110	111	113	114	116	117	118	120	121	123	\$7,000,000
91	92	94	96	98	100	101	103	105	107	108	110	111	113	114	115	117	118	119	121	\$8,000,000
89	91	93	95	96	98	100	102	103	105	107	108	110	111	112	114	115	116	117	118	\$9,000,000
88	90	91	93	95	97	98	100	102	104	105	107	108	109	111	112	113	114	115	116	\$1,000,000
86	88	90	92	94	95	97	99	100	102	104	105	106	108	109	111	112	112	113	114	\$1,100,000
85	87	89	90	92	94	96	97	99	100	102	103	105	106	108	109	110	111	111	112	\$1,200,000
84	86	88	89	91	93	95	96	98	99	101	102	103	105	106	107	108	109	110	111	\$1,300,000
83	85	87	88	90	92	93	95	96	98	99	100	102	103	104	105	106	107	108	109	\$1,400,000
82	84	86	87	89	91	92	94	95	96	98	99	100	101	102	104	105	105	106	107	\$1,500,000
81	83	85	86	88	90	91	93	94	95	96	97	99	100	101	102	103	104	105	106	\$1,600,000
80	82	84	85	87	89	90	91	93	94	95	96	97	98	99	100	101	102	103	104	\$1,700,000
79	81	83	84	86	88	89	90	91	93	94	95	96	97	98	99	100	101	101	102	\$1,800,000
78	80	82	83	85	87	88	89	90	91	93	94	94	95	96	97	98	99	100	101	\$1,900,000
78	79	81	82	84	85	87	88	89	90	91	92	93	94	95	96	97	98	98	99	\$2,000,000
77	78	80	81	83	84	85	87	88	89	90	91	92	93	94	94	95	96	97	98	\$2,100,000
76	77	79	80	82	83	84	85	87	88	89	90	91	91	92	93	94	95	95	96	\$2,200,000
75	76	78	79	80	82	83	84	85	86	88	88	89	90	91	92	93	93	94	95	\$2,300,000
74	75	77	78	79	81	82	83	84	85	86	87	88	89	90	91	91	92	93	94	\$2,400,000
73	74	76	77	78	79	80	82	83	84	85	86	87	88	88	89	90	91	92	93	\$2,500,000
72	73	74	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	91	\$2,600,000
71	72	73	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	\$2,700,000
70	71	72	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	88	89	\$2,800,000
69	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	87	88	\$2,900,000
69	70	71	72	73	74	75	76	77	78	80	80	81	82	83	84	85	86	86	87	\$3,000,000
68	69	70	71	72	73	74	75	76	78	79	80	80	81	82	83	84	85	85	86	\$3,100,000
67	68	69	70	71	72	73	74	76	77	78	79	80	80	81	82	83	84	84	85	\$3,200,000
66	67	68	69	70	71	73	74	75	76	77	78	79	80	80	81	82	83	84	84	\$3,300,000
65	66	68	69	70	71	72	73	74	75	76	77	78	79	80	80	81	82	83	84	\$3,400,000
65	66	67	68	69	70	71	72	73	75	76	76	77	78	79	80	80	81	82	83	\$3,500,000
64	65	66	67	68	70	71	72	73	74	75	76	76	77	78	79	80	80	81	82	\$3,600,000
63	64	65	67	68	69	70	71	72	73	74	75	76	76	77	78	79	80	80	81	\$3,700,000

**The value in the table is the management fee,
expressed as a percentage of the award value**