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Paying For The Future: An Analysis Of Large Awards For Future Care Costs

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In recent years, we have seen a tremendous increase in the size of awards that Canadian courts and juries are willing to grant plaintiffs for future cost of care. This head of damages, even prior to these recent cases, was already the largest component of a catastrophically impaired plaintiffs claim. The 2009 case of *MacNeil v Bryan*[1] saw the largest award for future cost of care in Ontario's history. The Superior Court of Justice in *MacNeil* made a total award of $18,427,207.20 to the plaintiff, a 15 year old female passenger in a vehicle that was involved in an accident that resulted in catastrophic injuries which included an open full frontal skull fracture with severe brain injuries, amongst other injures. The largest portion of the judgment was $15,158,500.00 awarded for future care costs. With this increase in the monetary compensation being provided to Canadian plaintiffs, special attention must be given to presenting a sound defence against inflated future care awards.

The general principle behind the quantification of an award for future care is that the court should seek to put the plaintiff into a position as close as possible to the position that they would have been in but for the accident. However, the award should not be so excessive as to allow for a windfall for the plaintiff's heirs once they are deceased.[2] With regard to the medical evidence required for such an award, Justice McLachlin (as she then was) of the British Columbia Supreme Court, in rejecting the plaintiff's submission that damages for future care costs should consider amenities that would be provided solely for the enjoyment of the plaintiff's life, and to make their life more bearable, stated that:[3]

> The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.
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> These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

With regard to competing options for future care, the court in *Brennan v Singh*[4] indicated that the test is "whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money.

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[1] ***MacNeil (Litigation Guardian of) v Bryan* (2009),** 74 CCLI (4th) 282, 81 CPC (6th) 116 (ON SCJ).
[2] *Monahan v Nelson* (2000), 49 CCLT (2d) 205 (BC CA).
[3] *Milina v Bartsch* (1985), 49 BCLR (2d) 33, [1985] BCWLD 654 (BC SC).
[4] *Brennan v Singh* (1999), [1999] BCJ No 520, 86 ACWS (3d) 537 (BC SC).

There are three key areas under the general heading of a future care costs awards that are often individually assessed. These areas are: Attendant Care, Medical Rehabilitation, and Home Maintenance and Housekeeping. Due to the potentially large awards that may stem from these heads of damage, as well as the subcategories therein, an in depth analysis of each category is warranted.

General Principles: The Standard for Establishing Future Care Costs

The leading case on the standard for proving future care costs is *Schrump v Koot*[5]*. Schrump* was an appeal to the Ontario Court of Appeal by the defendant over $20,000 awarded to the plaintiff for a back injury resulting from a motor vehicle accident. The plaintiffs appealed the judge's charge to the jury, claiming that the judge erred in not directing the jury to ignore the possibility of the plaintiff requiring further surgery, as it would probably not be necessary. Accordingly, *Schrump* raised the question, for the first time in Canada, of whether "possibilities", as opposed to "probabilities", of future loss or damage resulting from a present injury are to be taken into account in the assessment of a plaintiff's damages."[6]

In denying the appeal by the defendants, the Court set out the following principles:

- Although the plaintiff may have to prove, on a balance of probabilities, that the tortious act or omission was the operative cause of the harm suffered, it is not necessary for them to establish that the future care loss or damage will occur, **but only that there is a reasonable chance of such loss or damage occurring;**

- Speculative possibilities unsupported by expert or other persuasive evidence should be ignored, whereas substantial possibilities based on such **expert or persuasive** evidence must be considered in the assessment of damages for personal injuries;

- This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable;

- Therefore, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be **substantial and not speculative**.

An example of a case where these principles were largely relied on in the determination of future cost of care was *Gordon v Greig*.[7] In *Gordon*, the two plaintiffs were passengers in a vehicle that was involved in an accident. Neither plaintiff was wearing a seatbelt. Mr. Gordon suffered catastrophic brain injuries, upper spine injuries, and had a

[5] *Schrump v Koot* (1977), 4 CCLT 74, 18 OR (2d) 337 (ON CA).
[6] *Ibid* at para 1.
[7] *Gordon v Greig,* [2007] WDFL 1488, 46 CCLT (3d) 212 (ON SCJ).

diminished sense of smell, taste, and hunger, among other injuries. Mr. Morrison experienced catastrophic injuries which rendered him paraplegic. Mr. Gordon was awarded over $11 million, with $8.646 million attributed to future care. Mr. Morrison was awarded almost $12.5 million, with $8.8 million attributed to future care. Prior to the final determination of damages, defence counsel argued that there should be a 20% contingency on the attendant care award as Mr. Gordon would not likely accept the type of assistance that his counsel was seeking. The Judge rejected this argument, stating that "I am not convinced that there should be such a contingency when I take into account the evidence of many professional witnesses who stated that Mr. Gordon must have such attendant care. He might not like to have someone hovering about to help him, but the bottom line is that he does and always will need help."[8]

Attendant Care

There are three key variables that will affect the assessment of the Attendant Care aspect of a claim for future care costs.

Firstly, there is a large discrepancy between the rates charged by different professionals who may be required to supply attendant care. Depending on the type and complexity of the professional service being awarded to the plaintiff, there may be a dramatic effect on the hourly rate that will be paid.

The second variable to consider is the number of hours of service ordered by each specialist. This will also have a tremendous impact on the amount of the claim. This is especially true when attendant care is ordered for many decades. Plaintiff's future care experts will often take the position that the plaintiff requires 24/7 attendant care. Defence future care experts, by contrast, will often try to minimize the daily hours required.

The last variable is whether institutional care or home care is ordered. Institutional care is substantially cheaper as many expenses can be passed on to a provincially funded health care provider. However, often the plaintiff and/or the plaintiff's family members may insist on home care and that may drastically increase the defendant's potential exposure. Each of these three variables will be considered in further detail below.

Professional Care

The process of calculation of a claim for future care in relation to professional services was discussed in *Sandhu v Wellington Place Apartments*.[9] In *Sandhu*, the two year old plaintiff fell from a fifth floor window of an apartment building, landing on the cement pavement below and suffering catastrophic injuries including "a frontal lobe brain injury so severe that he will never be gainfully employed and will always require

[8] *Ibid* at para 77.
[9] *Sandhu (Litigation Guardian of) v Wellington Place Apartments*, 2006 CanLII 19463 (ON SC).

supervision."[10] The jury in *Sandhu* awarded the plaintiff total damages, interest and costs in excess of $17 million, including $10.942 million for future cost of care.[11] As it was a trial by jury, the reasons for the amount awarded are not published. However, the court did state that the process for quantifying such a claim is:

1. Take the parents out of the process. Harvinder's [the plaintiff] damages must not be reduced because his parents might be providing some of his care. The amount to purchase the care is what you are required to decide.

2. What is the evidence that you accept? Based on this evidence answer the following questions:

    a. How much care does Harvinder reasonably need i.e. 24 hours a day or something less?

    b. Who should provide the care? What skill level is required? Are different skill levels required at different times of the day?

    c. What does it cost to purchase this care?

The principles enunciated in *Sandhu* provide straightforward questions that allow a jury to adequately assess how much to award a plaintiff for future care.

Hours of Attendant Care

Once a court determines that a plaintiff requires attendant care, the question then turns to the number of hours required. Depending on the type of care ordered, the number of hours can be quantified daily, weekly, or monthly. Plaintiff's counsel will often retain experts who conclude that 24-hour care is required. Frequently included in a claim for 24-hour care is an allowance for "overnight security". For example, in *Desbiens v Mordini*,[12] plaintiff's counsel retained experts that concluded that the paraplegic plaintiff required an overnight attendant to assist with transfers from his bed to a wheelchair in the event of an emergency. The defendant's experts took the position that there were other "common sense practical options" to address the overnight security issue. However, they did not thoroughly canvass what those options included and as per *Andrews, supra*, they could not simply assert that the family of the plaintiff ought to provide this service. Although the defence adduced evidence that in the 18 years that the plaintiff lived in his apartment as a paraplegic he never had an emergency (as was envisioned by plaintiff's counsel), the court nonetheless found that the plaintiff did require an attendant to provide overnight security, but limited the cost for this service to minimum wage.[13]

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[10] *Sandhu (Litigation Guardian of) v Wellington Place Apartments*, 2008 ONCA 215, [2008] WDFL 3000 (ON CA), at para 8.
[11] *Ibid.*
[12] *Desbiens v Mordini,* 2004 CanLII 41166 (ON SC).
[13] *Ibid* at para 349.

With regard to hours of attendant care for professional services, such as rehabilitation workers or physiotherapists, the issue largely revolves around a “battle of the experts”. As such, it is of utmost importance that defence counsel retains reputable experts who present a solid evidentiary basis for their opinions on the amount of attendant care required by a plaintiff.

Institutional or Home Care

The decision to care for a plaintiff at home as opposed to in an institution can increase the value of a claim exponentially and can quickly become the costliest head of damages awarded against a defendant. For example, the Ontario Superior Court of Justice in *Keenan v Scandals Ltd.*[14] accepted expert testimony that the yearly cost of having the plaintiff, who had suffered severe head injuries which reduced him to a child-like state, live independently in an apartment with support was $164,599.95. By contrast, the yearly costs associated with the plaintiff, *Keenan*, residing in a long-term care facility was stated as $43,443.77.[15] Once this amount is compounded over the lifetime of a plaintiff, the final amount awarded can be extremely high.

The decision about whether a plaintiff would be better suited to institutional care versus home care is largely based on the specific facts of a given case. However, the Court in *Williams*[16] has provided some factors to assist in the determination of which setting is more appropriate for a plaintiff, including: the plaintiff’s level of awareness, potential for improvements in her condition, quality of care available at home, where greater quality of life was available, continuity of care, cultural belief, and impact on others if home care were selected.

In *Lusignan*,[17] the plaintiff suffered brain damage at birth and claimed against the hospital and physicians, who admitted liability. With regard to whether the plaintiff should be compensated for home care or institutionalized, the judge stated that the plaintiff, who was 14 years old at the time of trial, "almost certainly doesn't know whether she would prefer to live in her own home or in a group home and even if she did know she would not be able to communicate her wishes."[18] The judge, after summarizing the medical evidence, concluded that the plaintiff's needs would best be met by a group home and costs for future care were assessed on that basis. Moreover, Justice Jewers stated that the case law did not lay down an immutable principle that home care is invariably the proper standard, but that it was for the circumstances of each case to dictate what the level of care ought to be.[19]

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[14] *Keenan v Scandals Ltd., 2000 CarswellOnt 959 (ON SCJ).*
[15] *Ibid* at para 18.
[16] *Williams (Guardians ad litem of) v Low,* 2000 CarswellBC 409, 2000 BCSC 345.
[17] *Lusignan (Litigation Guardian of) v Concordia Hospital* (1997), 117 Man R (2d) 241, [1997] 6 WWR 185 (Man QB).
[18] *Ibid* at para 73.
[19] *Ibid* at para 46.

Home Care: Payment to Family Caregivers

A common occurrence with future care claims is the availability of family members to provide said care. This has resulted in the misconception that if a parent (or child) is able to care for an injured plaintiff, then this should result in a reduction to an award for future care, or at the very least a reduction in the hourly rate paid (assuming that the parent is not a professional in the field of service being provided). The 1978 Supreme Court of Canada decision in *Andrews v. Grand & Toy Alberta Limited*[20] clearly stated that support provided to a plaintiff by a family caregiver should not reduce the amount received for cost of care. The court stated, at paragraph 30:

> "Even if his mother had been able to look after Andrews in her own home, there is now ample authority for saying that dedicated wives or mothers who choose to devote their lives to looking after infirm husbands or sons are not expected to do so on a gratuitous basis."

The issue that subsequently arises is that of compensation that family caregivers should receive for their service (assuming that they are not professionals in the field of service they are providing). This issue generally arises in terms of care provided prior to trial. The reason for this is that many plaintiffs' families are unable to afford the professional care that the plaintiff may require and as such will provide this care by themselves until they receive a monetary award at trial. In the case of *Dufault v Kathed Holdings Ltd*.,[21] the British Columbia Supreme Court provided a concise review of the factors that are to be considered in the assessment of a claim for past services provided by a family member (also referred to as "in trust" services):

1. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;

2. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);

3. the maximum value of such services is the cost of obtaining the services outside the family;

4. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;

5. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There

[20] *Andrews v Grand & Toy Alberta Limited* (1978), 83 DLR (3rd) 452 (SCC).
[21] *Dufault v Kathed Holdings Ltd.*, 2007 BCSC 186, [2007] BCWLD 3633, at para 171.

should not be a discounting or undervaluation of such services because of the nature of the relationship; and,

6. the family members providing the services need not forego other income and there need not be payment for the services rendered.

With regard to factor “4” above, the Ontario courts have taken a different approach to valuing the services of a family member as compared to the opportunity cost that is being sacrificed by that family member. The Ontario Superior Court of Justice, in *Matthews Estate v Hamilton Civic Hospital*,[22] altered the position taken in *Dufault* by stating that:

> To limit the award to the amount of income or potential income lost by a claimant would undervalue high quality and skillful services provided by low income or unemployed family members. This would unfairly discriminate against such persons solely on the basis of their economic status.
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> Moreover, if the family had in fact hired professional caregivers, they would have been entitled to claim "the actual expenses reasonably incurred" under s. 61(2) (a). I see no reason why the damages assessed should be significantly less because the family members did not have sufficient financial means to hire professional caregivers.

The court indicated that without this adjustment to the factors enunciated in *Dufault*, the defence tactic of delaying the trial as a means of lowering the amount paid for attendant care would be successful. With the decision in *Matthews Estate*, the benefit of this tactic is removed.

In Ontario, the current position of the law with regard to attendant care provided by family members is that the court will not penalize a plaintiff solely due to the fact that a family member provided care. Therefore, it is not a legally valid position to assume that care provided by a family member was provided gratuitously.

Medical Rehabilitation

Medical rehabilitation focuses on those future services required to assist in the plaintiff’s future medical and social recovery.

The following chart, issued pursuant to subsection 268.3(1) of the Insurance Act, establishes the maximum hourly rates payable by automobile insurers under the Statutory Accident Benefits Scheme. Although the rate charged by individual

[22] *Matthews Estate v Hamilton Civic Hospital,* 2008 CarswellOnt 5978, 170 ACWS (3d) 650.

professionals can vary, this chart provides a good insight into the approximate rate of various professional service providers.[23]

Health Care Profession or Provider	**Maximum Hourly Rate catastrophic impairments**
Chiropractors	$134.15
Massage Therapists	$88.28
Occupational Therapists	$118.85
Physiotherapists	$118.85
Podiatrists	$118.85
Psychologists and Psychological Associates	$177.69
Speech Language Pathologists	$132.97
Registered Nurses, Registered Practical Nurses and Nurse Practitioners	$108.27
Kinesiologists	$88.28
Unregulated Providers	
Case Managers	$88.28
Family Counsellors	$88.28
Psychometrists	$88.28
Rehabilitation Counsellors	$88.28
Vocational Counsellors	$88.28

Plaintiff's counsel will often retain experts in various fields that will conclude that the plaintiff will require lifetime medical rehabilitation services such as physiotherapy, massage therapy, and speech pathology, amongst others. Further, these experts will often suggest that the plaintiff's condition will deteriorate, thus requiring a future increase in medical rehabilitation costs. The defendant, alternatively, will often retain medical experts to testify that the plaintiff does not require all the professional services that the plaintiff's experts are suggesting, and will often suggest that the plaintiff's condition has either reached a plateau or will improve in the future, thus requiring a lower award for medical rehabilitation expenses. As such, due to the hourly rate of many medical rehabilitation service providers, and due to the potential long term treatment plans that are sought, this head of damages can quickly become one of the largest aspects of an award for future care costs.

Overall, medical rehabilitation awards are largely case specific and will depend on the particular circumstances of each individual plaintiff. However, retaining experienced counsel with extensive knowledge of the medical rehabilitation needs associated with different injuries will allow insurers to mount a defence and obtain expert reports that will greatly assist in reducing the potential risks to insurers of an inflated award for this head of damages.

[23] Financial Services Commission of Ontario; Professional Services Guideline [August 2013]. Superintendent's Guideline No.02/13. Online: http://www.fsco.gov.on.ca/en/auto/autobulletins/2013/Documents/a-03-13-1.pdf.

Home Maintenance and Housekeeping

Maintenance costs are meant to compensate the plaintiff for those home-related activities that they are no longer able to complete on their own. Home maintenance services generally encompass those home-related activities that occur outdoors. This includes lawn maintenance, snow removal, handyman services and seasonal cleaning. By contrast, housekeeping services largely include indoor activities such as sweeping, vacuuming, dusting, and laundry.

Home Maintenance

Plaintiff's counsel will often retain experts who will conclude that an award for home maintenance costs should be granted. Home maintenance costs are largely subjective and difficult to determine, as they may or may not be required in the future. In *Fortey (Guardian ad litem of) v Canada (Attorney General)*[24] plaintiff's counsel claimed an annual allowance of $1,284.00 for lawn care and snow removal. However, in denying this allowance, the court found "it highly unlikely that he [the plaintiff] will occupy premises where either is required from him. He was never the owner of separate home premises except when he lived with Ms. Prosser who provided the very great majority of the purchase funds."[25] As such, if defence counsel is able to prove that the plaintiff will not require the service he is seeking, based on his past use of such services, there is the potential to avoid an award in this regard.

In *Gignac v Insurance Corporation of British Columbia*,[26] the defendant successfully appealed an award for home maintenance with regard to ongoing home renovations. Justices Kirkpatrick, Neilson, and Bennett stated that:

> Home Renovations: The request for home renovations was, following the recommendation of Ms. Edwards, $3,000, continuing for 15 years for a total of $32,000 [present value]. The evidence of Ms. Stewart was that the plaintiff had planned to do some home renovations. Mr. Gignac testified that he planned to do renovations to his ceiling and fireplace in the future, which is taken into account by Ms. Stewart.
> …
> The renovations are not to make life better for Mr. Gignac, they are simply things he had planned to do before the accident. The trial judge accepted, as a special damage award, that Mr. Gignac had to hire someone to perform a renovation which he otherwise would have done. In my view, the only justifiable award for home renovations is the ceiling as he had planned this renovation prior to the accident. Mr. Gignac estimated the cost at $10,000 and Ms. Stewart estimated at between $700 - 1,050. The added value to Mr. Gignac's home as a

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[24] *Fortey (Guardian ad litem of) v Canada (Attorney General)* (1997)*, 45 BCLR (3d) 264, [1997] BCJ No 2901 (BC SC).*
[25] *Ibid* at para 64.
[26] *Gignac v Insurance Corporation of British Columbia*, 2012 BCCA 351, [2012] BCWLD 7374 (BC CA).

> result of this renovation is also a factor, which was something considered by the trial judge when he made his special damage award. I would not disturb the one-time award for $3,000. However, the award for on-going home renovation assistance is not sustainable as a cost of future care award. [27]

This judgment, released in 2012, has a few important implications. Firstly, an award for renovations will take into account the utility to the plaintiff's rehabilitation and will not simply be awarded due to the fact that the plaintiff may undertake unspecified home renovations in the future. Secondly, the value added by any renovations to the home will be taken into consideration; although this judgment does not indicate to what extent.
Awards for home maintenance are generally small relative to other components of future care costs awards. However, the absence of a rigorous defence may expose a defendant to an award that incorporates yearly expenditures on unidentified repairs that the plaintiff may never require.

Housekeeping

Awards for housekeeping can drastically vary on a case by case basis. A recent Ontario Court of Appeal decision upheld a jury award of $250,000.00 for past and future housekeeping costs, in spite of the defendant's position that it was $100,000.00 too high.[28] Although these claims are generally presented on a weekly or monthly basis, they are able to reach substantial amounts when required for decades. Similarly, the retention of experts is often required to defend against a claim for excessive housekeeping expenses. Experts will take into account the work performed by the plaintiff prior to the accident, as well as the housework that they will likely be able to perform in the future.

Defending Actions: the Importance of Experts

The most important aspect of a defence to a claim for future care costs is the retention of experts to provide evidence on the quantification of such costs. Initially, both parties will retain Life Care Planning experts to assess the plaintiff ("future care cost experts"). The future care cost expert will then provide recommendations as to both the necessity and type of future services to be provided to that plaintiff.

Future care costs experts make recommendations based on an examination/interview of the plaintiff and on the existing expert opinions of various medical practitioners such as physiatrists, orthopaedic surgeons, neurologists, and neuropsychiatrists. As such, it is essential that various defence medical reports are obtained from reputable experts and are obtained *prior* to the future care costs expert's assessment. That way, the future care costs expert may base their recommendations on a firm medical foundation. Once the future care costs expert has provided their recommendations, the present value cost of those recommendations are then calculated by an expert accountant. In

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[27] *Ibid* at paras 45-46.
[28] *Pool v Lehoux,* 2007 ONCA 630, 52 CCLI (4th) 186, at para 14 (ON CA).

coming to a present value figure, the expert accountant will consider the cost of the recommendations, various contingencies, and the life expectancy of the plaintiff.

In awarding damages for future care costs, the court should take into account a discount for the plaintiff's shortened life expectancy.[29] For this reason, it is often necessary to retain a medical expert to opine on the plaintiff's life expectancy.

As such, it is essential that defence counsel is well versed in the different fields involved in an assessment of future care costs and is able to retain leading experts in those fields, so that their credibility and conclusions cannot be questioned at trial.

Conclusion

In conclusion, future care costs claims often amount to the largest head of damages being claimed, and subsequently may amount to the largest aspect of an award granted by a judge or jury. Although there are several areas that comprise the future care costs heading of damages, there are three key areas that form the majority of an award. These areas are: Attendant Care, Medical Rehabilitation, and Home Maintenance and Housekeeping.

To determine Attendant Care, both plaintiff's and defence counsel will often retain experts to determine what attendant care the plaintiff will require, how many hours of such care is required, and whether the plaintiff will be cared for in an institutional or home setting. The courts have further determined that family members are entitled to claim for their attendant care services provided, and this compensation cannot be lowered solely on the basis of their relationship to the plaintiff. As this care can be ordered for many decades, and the fees charged can be very high, defence counsel must be certain to retain reputable experts in every field that the plaintiff is claiming for to avoid a tremendous increase in the ultimate award made by a court.

With regard to Medical Rehabilitation, the fees charged by professionals can quickly become a substantial component of an award made in favour of a plaintiff. Experts will often be retained to determine what services will be most beneficial to a plaintiff and what services the plaintiff does not require as they will not assist in their recovery. As the determination of future needs is difficult to conclude with any certainty in the present, reputable experts must again be retained, and their analysis must be based on sound medical evidence to support their conclusions on the amount of medical rehabilitation the plaintiff will require and for what duration of time.

Home maintenance and housekeeping generally form a smaller portion of an award for future care costs. However, a vigorous defence must still be mounted to prevent an award for services that the plaintiff will never use, otherwise that only serves to inflate the total award given to a plaintiff. Further, if the plaintiff claims home maintenance and

[29] *Monych v Beacon Community Services Society,* 2009 CarswellBC 1081 (BC SC).

housekeeping for many decades, this factor can result in a fairly substantial increase in the total award made.

Overall, one cannot over emphasize the role that experts play in the determination of a future care costs award. The result of retaining an expert who either based their conclusions on insufficient medical documentation, or who is unable to properly defend their conclusions at trial, is that little weight will be attached to their testimony by the Trier of fact. This can result in an exponential increase in an award made to a plaintiff. As such, experienced defence counsel must be retained that are well versed in the various claims made by plaintiffs' counsel and the experts required to determine the true value of such claims. Although claims made for future care costs are meant to cover decades of future care, it cannot be forgotten that awards made against a defendant are often payable immediately, and in full.