

## **The Top 5 Tort Cases of the Preceding Year and Ever Increasing Damage Awards and the Future Care Case Law**

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There have been a number of interesting tort decisions over the last twelve months, some providing much needed clarification to the existing common law and some creating brand new law. As has been a trend in the past few years, damage awards have also seen an increase, primarily as a result of rising future care costs damages.

This paper examines five interesting tort decisions that were released over the course of the past year and have received substantial attention. It also examines the state of increasing future care costs awards and provides some helpful case law to consider when facing a significant future care costs claim.

### **I. Notable Tort Decisions**

#### **1. “But For” In the Forefront**

In the summer of 2012, the Supreme Court of Canada released its decision in *Clements v. Clements*<sup>1</sup> clarifying the proper test for causation.

In *Clements*, the plaintiff was injured while riding as a passenger on her husband’s motorcycle. At the time of the accident, the motorcycle was overloaded. As the defendant husband accelerated to pass a car, a nail that had punctured the bike’s rear tire fell out causing the tire to deflate suddenly, resulting in a crash. The plaintiff suffered a traumatic brain injury as a result.

The defendant argued that while he was negligent, his negligence did not cause the plaintiff’s injury. Rather, he presented expert evidence that the cause of the accident was the tire puncture and deflation, which would have occurred even without his negligence.

At the trial level, the trial judge found that due to the limits of scientific evidence, the plaintiff was unable to prove that she would not have been injured “but for” the defendant’s negligence. However, the trial judge applied the “material contribution” test and found the defendant liable.

The British Columbia Court of Appeal set aside the judgment because the “but for” causation test had not been proven and the material contribution test did not apply.

The Supreme Court concluded that the trial judge erred by:

- (i) requiring scientific proof as a necessary condition for finding “but for” causation; and
- (ii) applying the “material contribution to risk” test.

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<sup>1</sup> 2012 SCC 32.

The Supreme Court reiterated that the “but for” test is the appropriate test to determine causation in tort cases: the plaintiff must prove, on a balance of probabilities, that the injury or loss would not have occurred “but for” the defendant’s negligent act. The Court clarified that this does not require scientific proof of causation.

Proof that the defendant’s conduct “materially contributed” to the risk of the plaintiff’s injury is only sufficient in cases where:

- a) the plaintiff establishes that her loss would not have occurred “but for” the negligence of two or more defendants, each of whom is possibly in fact responsible for the loss; and
- b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors was in fact the necessary or “but for” cause of her injury, because each defendant can point to another as the possible “but for” cause of the injury, defeating a finding of causation against any one of them on a balance of probabilities.

In other words, material contribution only applies if the plaintiff cannot show which of several negligent defendants actually caused the event that led to the injury.

## **2. A New Tort is Born: Intrusion Upon Seclusion**

In 2012, the Ontario Court of Appeal recognized a new privacy tort: intrusion upon seclusion.

In *Jones v Tsige*<sup>2</sup>, the plaintiff and defendant worked at different branches of the same bank. The defendant accessed the plaintiff’s personal banking information 174 times over the course of four years.

In recognizing the new tort, Justice Sharpe stated that:

[i]t is appropriate for this Court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this Court to develop the common law in a manner consistent with the changing needs of society.

In order to make out the cause of action, the plaintiff must show the following:

- that the defendant’s conduct was intentional, which includes reckless;
- that the defendant invaded, without lawful justification, the plaintiff’s private affairs or concerns; and
- that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Notably, the plaintiff is not required to prove harm to a recognized economic interest.

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<sup>2</sup> 2012 ONCA 32.

Regarding quantum, the Court clarified that damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum. The Court of Appeal fixed the cap on damages for this new tort at \$20,000 (unless the plaintiff can also prove a pecuniary loss). Consequently, it is expected that many privacy tort claims will be pursued in Small Claims Court.

### **3. Clarification of Spoliation**

In *Stilwell v World Kitchen*,<sup>3</sup> a recent decision from the Ontario Superior Court of Justice, Justice Leach clarified the circumstances in which spoliation applies.

When applied, spoliation of evidence gives rise to a rebuttable presumption of fact that the missing evidence, had it been preserved, would have been unfavourable to the party that destroyed it.

The facts before the Court were not complex. The plaintiff brought an action against the manufacturer of a dutch oven that broke into pieces as he was washing it, causing a laceration to his wrist. The plaintiff told his wife to dispose of the product shortly after the incident. He testified that he gave no thought to a lawsuit at the time, he simply did not want to see the pot when he returned home from surgery. At trial, one of the issues was whether the jury should be charged on spoliation.

Despite the fact that this was the critical piece of evidence, Justice Leach held that he would not charge the jury on spoliation. He confirmed that an adverse inference does not arise merely because the evidence has been destroyed. In order to apply the adverse inference, there must be intentional destruction in circumstances where it can reasonably be inferred that the evidence was destroyed to affect the litigation. In this case, there was no evidence that the plaintiff intentionally destroyed the dutch oven, so the doctrine of spoliation would not be put to the jury.

However, the judge did clarify that his ruling did not prevent or restrict comments by counsel as to other implications that may flow from the absence of the broken product, including the lack of such evidence to corroborate the plaintiffs' allegations that the product was a certain type of dutch oven or the cause of its failure, or the difficulties faced by the defendants in not having that evidence available to challenge the plaintiffs' claims in that regard.

What defence counsel could not do was suggest, directly or indirectly, that discarding the product should give rise to any presumption that the dutch oven would have been "telling" against the plaintiffs.

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<sup>3</sup> [2013] ONSC 3354

#### 4. Litigation Privilege in Tort Claims

In *Panetta v Retrocom*,<sup>4</sup> a slip and fall action, Justice Quinn provided a helpful summary of the law surrounding litigation privilege.

It is well known that in order to invoke litigation privilege, the document in question must be created for the primary purpose of litigation, whether that purpose be actual or contemplated. However, there has been confusion with respect to litigation privilege over the last few years.

In this case, the question was whether or not litigation privilege applied to an investigation conducted by an adjuster prior to the appointment of defence counsel. More specifically, the plaintiff sought production of the adjuster's notes, file and reports, on the basis that litigation privilege had not yet arisen at the time they were created.

Justice Quinn, in a clear and, at times, humorous decision, held that the notes were privileged. He helpfully distinguished between first party claims (where the action arises out of a contractual dispute between insured and insurer) and third party claims.

Justice Quinn reviewed a number of cases, including some that have held that, for litigation privilege to arise, there must be a “substantial likelihood” of litigation or at least a “reasonable prospect” of litigation. He disagreed with those decisions in the context of third party claims stating that:

As soon as the female plaintiff fell and was injured on March 5, 2008, she was in an adversarial position with all of those who ultimately were to become defendants and with their insurers.

In third-party or tort claims (as opposed to claims by an insured against his or her own insurer), there is **no preliminary investigative phase where privilege does not attach to notes, reports and files of adjusters**. In third-party insurance claims, **the sole reason for any investigation by or on behalf of an insurer is because of the prospect of litigation**. It is naive to think otherwise; and the fact that the investigation may be used to arrive at a pre-lawsuit settlement does not detract from the point that I make. The prospect of litigation inherently includes the prospect of settlement.

...there is no purpose for the creation of documents by an insurer in a tort context other than: (1) for anticipated litigation; (2) for setting reserves; or (3) for seeking legal advice. For completeness, I would add, as a corollary to (1): for the purpose of settlement, which I see as inextricably entwined with “anticipated litigation”.

Justice Quinn also took the opportunity to address many other privilege related issues that arise in insurance cases including:

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<sup>4</sup> 2013 ONSC 2386 (S.C.J.)

- It is not essential that counsel be retained before litigation privilege attaches to a document.
- Documents and correspondence regarding reserves are “clearly something within the concept of litigation privilege”.
- “The internal memoranda and work sheets of the adjuster [are] privileged . . . and need not be produced”.
- Statements or information from the opposing party must be produced, but not “notes containing commentary, remarks, observations, etc. . . . [recorded] during an interview or questioning of an opposing party”.
- Written witness statements are prepared for the purpose of litigation and are therefore privileged and do not need to be disclosed. However, facts relevant to the case must be disclosed via examinations for discovery, whether they are in privileged documents or not.

## 5. **Lee v. Toronto District School Board**

In *Lee v. Toronto District School Board, et al.*,<sup>5</sup> Justice Lauwers considered the case of a plaintiff, a seven year old student, who was punched by another student during recess and suffered a brain bleed. As a result, he suffered from physical, mental and emotional impairments that affected his daily living and diminished his future prospects.

This is an important and complex case that considers the proper test for causation, the effect of a “crumbling skull” on damages, as well as provides commentary on expert bias.

### **a. Causation**

With respect to causation, the judge found that but for the student’s punch, the brain bleed would not have occurred when it did. However the plaintiff was at risk of a brain bleed even without the punch, making him also a “crumbling skull” plaintiff, which impacted on the assessment of damages.

### **b. Expert Bias**

The plaintiff retained a liability expert to comment on the deficiencies in the supervisory system at recess.

The judge criticized the expert for offering her opinion on the ultimate questions to be determined by the court regarding negligence. He further noted that she appeared sympathetic to the plaintiff given that she summarized the plaintiff’s medical condition extensively, which was irrelevant to her task.

Justice Lauwers spent part of the decision explaining the importance of expert neutrality and the problem of expert bias. However, given that disqualification of an expert can be devastating to a party’s case, judges are loath to do so.

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<sup>5</sup> 2013 ONSC 3085.

However, the judge stated that where an expert's neutrality is questionable, so is the reliability of the expert's evidence.

The plaintiff's expert did not bring her file to trial, but admitted that she reformulated the question that was asked of her. The judge held that the expert reformulated the question in order to fit the desired outcome and therefore the expert demonstrated her partiality to the plaintiff. This, in turn, raised a serious issue about her reliability.

Justice Lauwers further held that on reflection, although he qualified the expert, she was testifying outside of her area of expertise and he ultimately rejected her conclusions on the applicable standard of care in supervision.

The judge noted that she had no experience teaching or supervising elementary school children, she had not devised a system for supervision, nor had she written on the subject. Her research in the area was carried out solely for the purposes of providing an expert opinion to the court. He explained that:

it is inappropriate to qualify an expert where that expert's source of proposed expertise comes from reviewing literature in respect of a subject matter which is outside the field of the witness' education and training.

### **c. Damages**

The judge held that the School Board was not negligent in failing to prevent the assault and dismissed the action. However, as is customary, the judge assessed damages in the event the matter was appealed.

With respect to physical impairments, the plaintiff had a degree of left side paralysis and no functionality in his left hand. He also suffered from vision field limitations on the left side in both eyes. With respect to cognitive impairments, he had delayed processing speed and lacked concentration for longer than 30 minutes. The plaintiff also suffered from anxiety and depression.

Although he obtained strong marks in high school and attended university at the time of trial, he tired easily and had to nap frequently, including during class. The evidence was that the plaintiff had no real treatment for his disabilities since his discharge from the hospital over a decade prior to the trial.

General damages were fixed at \$300,000, which was close to the cap. The judge accepted the plaintiff's future care cost analysis and fixed future care damages at \$2,687,442. The judge awarded another \$1,864,021 for loss of future income.

However, the judge held that the plaintiff was a crumbling skull plaintiff. The evidence led to the conclusion that had he not bled as the result of the punch that there was a strong probability that the plaintiff would eventually have bled with possibly catastrophic consequences. As a result, the judge ultimately discounted the pecuniary damages by 17.5%.

## II. Future Care Costs

Given the cap on general damages, which is presently approximately \$350,000, it is non-pecuniary damages, and, in particular, increasing future care cost damages, that have led to higher damage awards recently. As can be seen in *Lee*, future care costs often represent the bulk of the damages award.

The purpose of an award for future care is to restore, as best as possible with a monetary award, the injured person to a position he would have been in had the accident not occurred. However, from a practical standpoint, it is difficult to assess the quantum of this head of damage as it cannot be predicted with certainty since the plaintiff's condition may improve, stay the same, or worsen.

In order to recover future care costs, the plaintiff does not need to prove that the future care loss will occur, but rather there is a reasonable chance that such a loss will occur.<sup>6</sup> The case law establishes that there must be a medical justification for claims for cost of future care and that the claims must be reasonable.

### a. Landmark Case Law

One of the most well-known cases regarding future care costs is *Sandhu (Litigation Guardian of) v Wellington Place Apartments*.<sup>7</sup> This was a jury trial in which almost \$11 million was awarded for future care costs for a brain-injured infant who had fallen from a fifth storey apartment window.

The defendant appealed the jury award and argued that the jury erred in awarding more than the highest amount sought by the plaintiff. The plaintiff's highest estimate for future care cost was \$9.605 million. This figure represented attendant care, rehabilitation support, responsible persons for night-time, speech and language therapist, job coach, occupational therapist, physiotherapist, neuropsychology expert, psychology/ counselling, family support, cognitive rehabilitation, summer activity, case management and transportation costs.

The Court of Appeal upheld the jury award. It stated that the plaintiff used lower hourly rates in parts of its assessment than those rates that the expert witnesses suggested. It was within the power of the jury to accept the evidence of the experts and award a higher amount than the figure recommended by the plaintiff.

After the jury award, the trial judge decided the issue of future care costs relating to guardianship.

As with other future care costs, the judge noted that the plaintiffs did not have to prove the future guardianship costs on a balance of probabilities. They needed only show that there is a real and substantial risk that they will incur the guardianship costs in order to be entitled to compensation. Given the complexity of the issues, the judge believed two guardians were required, a non-corporate guardian and a corporate guardian.

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<sup>6</sup> *Schrump v Koot*, (1977) 82 DLR (3d) 553, [1977] OJ No 2502.

<sup>7</sup> (2006) 149 ACWS (3d) 572, [2006] OJ No 2448.

The judge awarded:

- \$268,000 for a non-corporate guardian (based on 10 hours per week at \$15 per hour);
- \$1,127,000 for a corporate guardian; and
- \$400,000 for future legal fees that will be incurred.

In another landmark decision, *Morrison v Greig*,<sup>8</sup> two catastrophically injured men were awarded over \$8.5 million each for future care costs by a jury. One plaintiff, Morrison, suffered a spinal cord injury, leaving him paraplegic. The other plaintiff, Gordon, suffered a catastrophic brain injury which left him without bladder and bowel control and senses of smell, taste, hunger and temperature.

In *Marcoccia v Gill*,<sup>9</sup> the plaintiff was awarded \$14 million for future care costs. The plaintiff, a 20 year old recent high school graduate, suffered a traumatic brain injury.

The main factor driving the aforementioned awards was the cost of 24/7 supervision. During the day time, supervision was required to assist the plaintiffs through daily activities. At night, if there were an emergency, the plaintiffs might become confused or unable to react. Even though the plaintiffs in these cases could do many things for themselves and slept through the night, the doctors testified that there was *a substantial risk* that the plaintiff might not be safe if left alone.

### **b. Non-Catastrophic Injuries**

Significant future care costs have also been awarded in non-catastrophic injury claims.

In *Tsalamandris v McLeod*,<sup>10</sup> the plaintiff was injured in a motor vehicle accident. She suffered from soft tissue injuries and a depressive disorder and was awarded \$100,000 in general damages.

The plaintiff's damages award for future care, which totalled over \$100,000, included \$93,000 for pilates. The plaintiff's doctor had recommended that the plaintiff continue pilates indefinitely to treat her chronic pain and her mood. This recommendation provided the medical justification for the award, which was equivalent to attending pilates class three times per week until the plaintiff turned 80 years old.

However, the trial judge rejected a claim for acupuncture, as the plaintiff had pursued it on her own and there was no medical evidence in support of it at trial.

The defendants appealed the future care cost aspect of the award, arguing it was excessive.

The British Columbia Court of Appeal, while making a 10% reduction in this award for contingencies, largely upheld the award. The Court reasoned:

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<sup>8</sup> (2007) 154 ACWS (3d) 865, [2007] OJ No 225.

<sup>9</sup> (2007) 156 ACWS (3d) 831, [2007] OJ No 1333.

<sup>10</sup> 2012 BCCA 239, 322 BCAC 261.

The trial judge based her award on her finding that this particular Pilates programme was medically necessary in assisting the respondent manage her chronic pain and, consequentially, her chronic depression. She relied on medical evidence that the respondent should continue with this programme indefinitely...

I am satisfied that there was evidence before the trial judge capable of supporting the inference that this particular Pilates programme offered the respondent benefits not available in other programmes and not easily replicated by exercising at home. Similarly, the evidence is capable of supporting the conclusion that the respondent would benefit from using the programme consistently and continuously regardless of the “waxing and waning” of her depression. I do not think the trial judge made any error in failing to recognize a negative contingency based on temporary improvements in the respondent’s depression.

### c. Recent Reductions

While the Court of Appeal upheld the award in *Tsalamandris*, there have been several recent appellate decisions reducing trial judge’s future care cost awards. The analysis undertaken by the courts in these cases is useful to anyone disputing a future care cost report, particularly in a non-catastrophic injury case.

In *Penner v Insurance Corporation of British Columbia*,<sup>11</sup> the plaintiff was injured in a motor vehicle accident and suffered a knee injury resulting in chronic pain. With respect to costs of future care, the trial judge reviewed an occupational therapist’s report which identified the cost and “replacement frequency” of a number of items said to be required by the plaintiff to cope with his injuries. The trial judge reviewed each item and applied a 20% contingency discount in light of the substantial possibility that he plaintiff’s condition would improve. The ultimate future care cost award was \$120,325.00 and included future home maintenance, yard maintenance, housekeeping, attendance at a gym, psychotherapy treatments, etc.

On appeal, the Court reduced the award by roughly \$80,000. The Court reminded litigants not to go overboard with future care cost claims:

While [future care costs] claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, **in cases where injuries are nowhere near catastrophic in**

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<sup>11</sup> 2011 BCCA 135, 17 BCLR (5th) 244.

**nature or result. This is a reminder that a little common sense should inform claims under this head, however much they may be recommended by experts in the field.**

This decision has been widely cited with approval over the course of the last three years in British Columbia and Alberta.

Most recently, in *Jarmson v Jacobsen*<sup>12</sup> Justice Meiklem confirmed the common sense approach in awarding treatment for cost of future care. The plaintiff in this case was involved in a motorcycle accident and was awarded significant damages at trial as he sustained serious injuries. However, his claimed damages for cost of future care were met with skepticism.

In criticizing the expert evidence on this point, Justice Meiklem stated:

The defendant's closing submission listed 20 items recommended by Ms. Landy that the defendant argued were not medically supported by any evidence at trial. I agree with that submission. Many of those items would require very significant outlays, for example, a van with a lifting device to transport an anticipated power mobility device.

The Court held that the plaintiff's "Life Care Plan [was] not just a Cadillac; it was a gold-plated one, which goes far beyond what [was] reasonable."

A recent British Columbia Court of Appeal decision, *Gignac v. ICBC*,<sup>13</sup> discussed the appropriate analysis that trial judges should undertake when considering future care costs awards.

At trial, the plaintiff received the full amount sought for future care costs, \$116,000. The ICBC appealed arguing that the evidence did not support some of the claims made and that the trial judge did not apply the proper analysis. The Court of Appeal agreed and reduced the award by almost \$45,000. In doing so it explained that:

The failure of the trial judge to perform an analysis of each item sought by the plaintiff with respect to whether there was "some evidentiary link between the physician's assessment of pain, disability and recommended treatment and the care recommended by a qualified health professional" was a legal error.

Notwithstanding these recent deductions and the skeptical approach taken by the appellate courts, defendants should be aware of the importance and the strategies available to them in defending against future cost claims.

<sup>12</sup> 2012 BCSC 64, [2012] BCJ No 90.

<sup>13</sup> 2012 BCCA 351

#### **d. Responding Reports**

It is a promising sign that appellate courts have been slashing future care costs awards as of late. However, appeals are costly and slow. In many cases, the most efficient and effective way of dealing with a future care costs report is to obtain a thorough responding report. Often, an in home assessment by an occupational therapist is one of the best ways to obtain evidence for a responding report. However, over the course of the last few years, the ability to obtain an independent medical exam conducted by an occupational therapist has been a controversial topic.

Section 105 of the *Courts of Justice Act*, governs the medical examinations of parties in civil litigation. It is clear that for the purposes of the legislation, health practitioners only include doctors, dentists, and licensed psychologists. Health practitioners do not include occupational therapists.

A strict and literal interpretation of the *Courts of Justice Act* excludes non-health practitioners from conducting examinations. However, courts have commonly allowed examinations by other professionals if required by the examining physician as a “diagnostic aid.”

Some judges have dismissed motions for assessments from occupational therapists brought to assist in the assessment of future care costs, as the assessments were not, strictly speaking, a “diagnostic aid.”

However, there are several recent decisions supporting assessments by occupational therapists, even where the assessments are not required as a “diagnostic aid” but rather required to fairly assess future care needs.

In *Moore v Wakim*,<sup>14</sup> the plaintiff had served a future care cost report alleging attendant care could potentially exceed \$2 million. The defendant then brought a motion seeking to compel the plaintiff to attend a future care assessment with an occupational therapist.

The plaintiff opposed the order on the basis of a line of cases that stood for the principle that assessments by non-health care practitioners, such as an occupational therapist, must be necessary as a “diagnostic aid” to assist a health care practitioner in completing his or her report.

The plaintiff had already attended orthopedic and psychiatric IMEs and it was common ground that the occupational therapist was not going to be providing assistance for “diagnosis.”

Justice Howden held that the court has inherent jurisdiction to exercise its discretion in ordering assessments. According to him, it was not necessary to show that the assessment is a “diagnostic aid.” He agreed with the defendant that the report was vital to the final result in the case since future care was a principal issue.

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<sup>14</sup> 2010 ONSC 1991, [2010] OJ No 1492.

In *Vanderidder v Aviva Canada Inc.*<sup>15</sup>, the defendant sought an order compelling the plaintiff to participate in a life care assessment plan by a certified life care planner/occupational therapist. The plaintiff opposed the motion on the basis that the requested assessment was not necessary to aid a health practitioner as a “diagnostic tool.”

The judge concluded that fairness could only be achieved by ordering the plaintiff to participate in a life care assessment by a person other than a “health practitioner” notwithstanding that there is a lack of evidence that such an assessment is needed by a health practitioner as a “diagnostic aid.”

In the most recent decision on the subject, *Cook v. Glanville and the City of London*<sup>16</sup>, the City moved for an order to compel the plaintiff to undergo an in-home occupational therapy assessment.

Like in the two aforementioned cases, the plaintiff opposed the motion because:

- The proposed assessor was not a "health practitioner" as defined in s. 105(1) of the *Courts of Justice Act*; and
- There was no evidence that a "health practitioner" required the assessment as a diagnostic tool.

The defendant argued that trial fairness required that the defence be permitted to have its assessor conduct an independent in-home occupational therapy assessment of the plaintiff, which was necessary for the calculation of the plaintiff's future care costs.

Justice McDermid stated that it was appropriate to exercise his discretion to order the assessment based on the following considerations:

- The report sought was necessary to provide the defendant with an independent evaluation of the plaintiff's physical limitations and consequent needs in the context of his home environment.
- That report would form the basis of an assessment by the Certified Life Care Planner of the plaintiff's future care costs. Both the defendant's expert physician's report **and** the report of the occupational therapist are necessary components to be used in the calculation of future care costs.
- The defence was entitled to know the case it has to meet and was entitled to make an independent assessment of the plaintiff's claims.
- The claim for future care costs was substantial.
- The report might assist in settlement discussions.
- Should the matter go to trial, the court would benefit from the testimony of expert witnesses who possess the same level of knowledge.
- The report might reveal common ground between the experts on each side, which in turn could lead to a simplification of the trial.
- No undue hardship or prejudice would accrue to the plaintiff if the order is granted.

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<sup>15</sup> 2010 ONSC 6222, 7 CPC (7th) 219.

<sup>16</sup> 2012 ONSC 405, [2012] OJ No 133.

The judge ruled that the plaintiff must attend the in-home assessment within the two weeks after his decision. If the matter went to trial, the health practitioner who conducted the assessment could be called as an expert.

Despite the controversy surrounding the area of “non-practitioner” assessment, in the right circumstances, obtaining a thorough, responding future care cost assessment is an important step in addressing what has been perceived as the increasingly “gold plated” future care cost reports produced by plaintiffs’ experts.

While these decisions do not create a rule of automatic entitlement to an in-home future care assessment by a non-health practitioner in all cases, should a defendant be served with a significant future care costs report, these decisions are a helpful tool in considering the appropriate response and potentially compelling the plaintiff to attend such an IME.

#### **e. Scrutinizing Medical Evidence**

Even where a responding report is not obtained, the defendant should also take care to scrutinize the plaintiff’s claims that do not appear reasonable.

In *Degennaro v Oakville Trafalgar Memorial Hospital*,<sup>17</sup> the plaintiff injured her sacrum when a hospital bed collapsed under her. She ultimately developed into fibromyalgia, resulting in constant pain.

With respect to future care costs, the trial judge had relied on two reports authored by a rehabilitation counselor summarizing the future costs. The plaintiff did not call the rehabilitation counselor as a witness, so there was no testimony at trial addressing the need for the items in the reports. However, the defendants did not produce a report to refute the amounts in the plaintiff’s reports.

The trial judge accepted the rehabilitation counselor’s reports, reduced the total by 5% for contingencies, and awarded the plaintiff \$1.6 million for costs of future care.

The defendant appealed on numerous grounds, including the future care cost award. The defendant’s position was that the amount for costs of future care was not made out on the record.

The Court of Appeal held that the trial judge had erred in using the reports to determine the damages for costs of future care. While there was clearly a need for future care costs, the amounts were unsubstantiated. The Court of Appeal held that there was some basis for awarding damages for the costs of future care based on the evidence provided by the medical records and evidence led at trial. The Court of Appeal explained that:

[h]ad the trial judge not erred in finding that the amounts set out in the report were undisputed, he would have subjected each of the items claimed in the [reports] to a critical analysis to determine whether the claim had been established on the record and whether the assumptions made were reasonable.

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<sup>17</sup> 2011 ONCA 319, [2011] OJ No 1836.

Given that the parties accepted the costing of the goods and services in the report, but rather disputed the *need* for the goods, the Court of Appeal determined that the reports did not need to be entirely rejected. Rather than order a new trial on the aspect of damages, the Court of Appeal reduced the award by \$375,000.

In *Parker v Davies*,<sup>18</sup> a recent decision in British Columbia, Justice Meiklem considered the case of a plaintiff who sustained damages in a motor vehicle accident.

The plaintiff suffered from grade 1 whiplash and acute stress reaction (relating to panic on entering vehicles). Her doctor noted slight tenderness over her C-spine and muscle spasms. The plaintiff was referred to physiotherapy, but she did not receive any physiotherapy treatments until approximately a year later. She was also treated with massage therapy.

She suffered ongoing pain in her back and was eventually diagnosed with a disc protrusion. However, at the time of the trial, surgical treatment was not considered necessary.

With respect to future care costs, the plaintiff advanced a claim for costs of future care totalling \$137,588. The judge noted that the sum represented the present values of services, equipment, and with two recurring items, chiropractic treatment and “rofling” which were alleged as necessary for the remainder of Ms. Parker’s life expectancy.

The judge noted that he had never heard of “rofling” before this trial and that there was no authoritative evidence presented about what “rofling” was, much less any medical evidence that it is medically necessary in the plaintiff’s case.

The plaintiff credited it as the most beneficial treatment that she has undergone in relieving the pain that radiates to her leg.

The judge noted that:

In researching previous decisions of this court, I found two cases where Rofling treatments were funded as part of special damages awarded, without medical evidence of medical necessity... where the court acknowledged Rofling costs as part of future care costs on the basis that, although not prescribed by her doctors, the plaintiff said the treatment gave her relief and the court found that the amount (\$140 annually out of total annual care costs of \$1,060) did not seem excessive.

The judge concluded that:

...this is not a case where the court should deviate from the established principle that the appropriate award for the cost of future care is an **objective one based on medical evidence**. Accordingly, I will not consider potential future Rolfing costs in my assessment.

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<sup>18</sup> 2013 BCSC 758, [2013] BCJ No 881.

**Conclusion**

Future care costs are clearly contributing to the significant rise to escalating damage awards. Unfortunately, there is inherent difficulty in assessing the quantum of future care costs. Given the significant amount that defendants may be found liable to pay for the plaintiff's future care, defendants' counsel must stay abreast of recent case law and make sure to proactively address this head of damage.