Analysis

Cost of Future Care: Theoretical Foundation

1. In Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Carswell, 1996), the following is stated at pp. 101-102:

   The principal division of a compensatory award in personal injury claims is among four heads of damages. This division accommodates both the distinction between special and general damages as well as that between pecuniary and non-pecuniary loss... the fourfold classification had been developed prior to 1978 and was cemented by the Supreme Court of Canada in the damages trilogy.

2. At pg. 104, Cooper-Stephenson summarizes the third head of damages, future cost of care, as follows:

   Future cost of care encompasses all post-trial expenses which the plaintiff will now incur, but which he or she would not have incurred. The primary focus here is on medical and hospitalization expenses, and on expenses which will be incurred in adjusting to an appropriate post-accident living environment. Miscellaneous costs may also be claimed. The possibility of awarding a management fee for the lump sum might be considered here, although it now seems preferable to consider that item separately. Damages under this head may be divided according to whether they involve initial capital outlay or ongoing expenses. An important feature of the latter is that they will have to be grossed-up to deal with the taxation of interest generated by the lump sum.

3. The foundation for awards of cost of future care is the principle of *restitutio in integrum*. In *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff’d (1987), 49 B.C.L.R. (2d) 99 (C.A.), McLachlin J. (as she then was) wrote:

   The fundamental governing precept is *restitutio in integrum*. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care, and special damages.

4. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, Dickson J. emphasized that “full compensation” is the paramount concern under this head of damages:
Money can provide for proper care: this is the reason that I think the paramount concern of the courts when awarding damages for personal injuries should be to assure that there will be adequate future care.

5. However, as Dickson J. also noted in *Andrews* at 241-42, money alone cannot achieve this goal:

   In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, restitutio in integrum is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

6. Additionally, as McLachlin J. made clear in *Milina*, an award of damages for cost of future care should not take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should only reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health.

7. Thus, in *Whetung v. West Fraser Holdings Ltd.*, 2007 BCSC 990 at para. 49, Grist J. rejected a claim for a sauna to alleviate pain because such an item was more akin to an amenity to be paid for out of pecuniary damages.

8. In Carla Brown, *Damages: Estimating Pecuniary Loss*, vol. 2 (Canada Law Book: 2010), pg. 10-2, the author summarizes the law as follows:

   *Andrews* affirmed the paramountcy of adequate care for those seriously injured through the fault of others. Although the economic calculations associated with cost of care awards are relatively simple compared with those for other heads of damage, cost of care will often make up the biggest part of a plaintiff’s overall award, especially in instances where he/she is seriously injured from a spinal cord injury or brain damage.

   It is an oft repeated statement in the case law that cost of care awards embody the restitutio principle. As Morrison J. wrote in *Williams v. Low*, 2000 BCSC 345 at para. 25:

   This is not an exercise in how to save money. This is an analysis of how best to compensate the plaintiff for her grievous injuries and her loss of quality of life that occurred through no fault of her own but, rather,
because of the negligence of the defendant. This is not a discussion of retribution but, rather, one of compensation.

9. As Klar, Linden, Cherniak, & Kryworuk note in *Damages and Remedies in Tort* (Carswell, 1995), at §57:

Assessing damages to meet the cost of future care is of paramount importance in personal injury cases. Damages are to be assessed by application of the principle of restitutio in integrum, so that the plaintiff is entitled to the sum which will place the plaintiff in the position he enjoyed prior to the infliction of the injury, insofar as money can accomplish this objective. An award for the cost of future care will not be reduced by a consideration of: i) the social costs of such an award; ii) the defendant’s ability to pay; iii) the standard of care deemed appropriate in statutory compensation schemes, for example, Workers’ Compensation, Canada Pension Plan; and iv) the possibility that the plaintiff will squander his award rather than using it to meet future care costs. Moreover, the plaintiff’s duty to mitigate does not require him to accept compensation for less than his real loss. However, the award must be reasonable in that it must be moderate and fair to both parties.

10. The House of Lords has also referred to the governing principle in this area as that of “full compensation”. In *Pickett v. British Rail Engineering*, [1980] A.C. 136 at 168, Lord Scarman wrote:

…when a judge is assessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed anything else would be inconsistent with the general rule… though arithmetical precision is not always possible, though in estimating future pecuniary loss a judge must make certain assumptions (based upon the evidence) and certain adjustments, he is seeking to estimate a financial compensation for a financial loss. It makes sense in this context to speak of full compensation as the object of the law.

11. As Earl Cherniak Q.C. observed in “Proof of Pecuniary Damages”, 4 Adv. Q. No. 3 (Oct. 1983), “although the trilogy… is the authority for the arbitrary limit of $100,000 on non-pecuniary losses, these cases clearly impose no such limitation on non-pecuniary damages predicated on the proposition that there will be full and complete (some say perfect) compensation for economic loss. In a curious way, that arbitrary limitation has made many judges more receptive to giving full compensation for economic loss since they are so limited in the non-pecuniary area, especially in the catastrophic cases and in some that are less than catastrophic.”
12. Damages for cost of future care are indeed often the largest head of damages in catastrophic injury cases. Three recent Ontario cases underscore this trend. In *Sandhu v. Wellington Place Apartments*, 2008 ONCA 215, the jury awarded the plaintiff $10,942,000 for cost of future care, which was more than the plaintiff’s counsel had sought in closing submissions. This award was upheld on appeal.


   144  The defence went through the items for future care line by line questioning each. Suggestions were made that the dollar value for some items might be less or that less attendances by physiotherapists, personal trainer, the occupational therapist and others. The end result is that one might go through these items and whittle away at them, but there would only be a major reduction if one were to conduct a major reduction in services. As I have stated previously in these reasons, the outcome of such a harsh excising of assistance to Mr. Morrison would be to shift the cost and responsibility to members of his family. This is not a self-insuring regime. Rather, the assessment of damages is a process to provide reasonable and needed compensation for injuries sustained along with treatment and care. In this case, the care is for the rest of Mr. Morrison's life.

14. Most recently, in *Marcoccia v. Ford Credit Canada Limited*, 2009 ONCA 317, leave to appeal ref'd [2009] S.C.C.A. No. 255, the Jury assessed the future cost of care award at $13,952,064.00, which to my knowledge is the highest cost of care award in Canada to date. This award was upheld on appeal, the Court stating:

   31  In our view, the jury's assessment of damages in this case was not "plainly unjust and unreasonable". Rather, it was based on expert evidence properly adduced at trial. No evidence was led at trial with respect to the alleged overlap in the calculations advanced by the respondent's expert. Although the parties' experts disagreed as to assumptions relating to the appropriate level and length of care required, it was open to the jury to prefer the respondent's expert on these points. Further, the jury did not simply adopt the figures advanced by the respondent's expert. Substantial reductions were effected to many of the claims, including a reduction in the claim for future care costs. Accordingly, this court has no basis upon which to interfere with the jury's assessment of damages.
15. Given the huge amounts a defendant may potentially be found liable to pay for a plaintiff’s future care, defending such future care claims is of fundamental importance in a catastrophic injury case.

The Test

16. An award for the cost of future care is appropriate when the plaintiff is able to demonstrate that such care is medically justified to restore her to her pre-accident condition. In *Aberdeen v. Zanatta*, 2007 BCSC 993 at para. 120, aff’d on this point, 2008 BCCA 420, the court confirmed that the proper approach to an award of future care costs was stated in *Milina*:

   [120] Thus, I think the solution is to consider “full” compensation espoused in *Andrews* in the context of the more pragmatic and widely-followed test set out in *Milina*, namely that there should be medical justification for a cost of future care expense, and the expense must be reasonable.

17. Thus, the plaintiff must establish that the costs that will be incurred are: (1) medically justified; and (2) reasonable. If the plaintiff fails to do so, he or she has failed to prove damages, and should not receive an award.

*i) Medically Justified*

18. The standard of proof is “simple probability” – different from the balance of probabilities. The plaintiff must establish a real and substantial risk of incurring the expense before an award for future cost of care will be made. In *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 at 12-13 (Ont. C.A.), Doherty J.A. wrote:

   A plaintiff who seeks compensation for future pecuniary loss need not prove on a balance of probabilities that her future earning capacity will be lost or diminished or that she will require future care because of the wrong done to her. If the plaintiff establishes a real and substantial risk of future pecuniary loss, she is entitled to compensation…

   A plaintiff who establishes a real and substantial risk of future pecuniary loss is not necessarily entitled to the full measure of that potential loss. Compensation for future loss is not an all-or-nothing proposition. Entitlement to compensation will depend in part on the degree of risk established. The greater the risk of loss, the greater will be the compensation. The measure of compensation for future economic loss will also depend on the possibility, if any, that a plaintiff would have suffered some or all of those projected losses even if the wrong done to her had not occurred. The greater this possibility, the lower the award for future
pecuniary loss. Factors affecting the degree of risk of future economic loss and the possibility that all or part of those losses may have occurred apart from the wrong which is the subject of the litigation are referred to as contingencies.


20. Commonly, cost of future care awards are based on speculative future scenarios. In *Krangle (Guardian ad litem) v. Brisco*, 2002 SCC 9, Chief Justice McLachlin wrote:

21 Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person’s best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, “The Normal Expectancies Measure in Tort Damages” (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the “‘normal expectancies’ measure”, a term which “more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached . . . had it not been for the tort”. The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

21. However, to satisfy the test, there must be evidence justifying the medical validity of the items claimed: *Aberdeen* at para. 120. Without an evidentiary foundation to show that treatments are medically justified in the future, the
court should reject the claim: *Job v. Van Blankers*, 2009 BCSC 230 at paras. 145-47.

22. In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, the Court explained this distinction. The plaintiff relied solely on the report of an occupational therapist to ground her future care award, which was rejected at trial.

23. For the Court, Garson J.A. found that the trial judge had erred in denying the award on the basis that a physician had not testified as to the medical necessity of each and every item of care that was claimed (at paras. 39, 47).

24. However, Madam Justice Garson confirmed that “there must be some evidentiary link drawn between the physician’s assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional,” such as an occupational therapist (at para. 39).

25. This led the Court to deny the plaintiff’s claim for chiropractic care, which had “no evidentiary support from the physicians” (at para. 43), but to allow an award for house work and yard maintenance, as the evidence of the physicians provided an evidentiary foundation to justify the occupational therapist’s recommendation on this point (at paras. 46-47).

26. *Gregory* adds a nuance to the law stated in *Nike Canada* and *Frers*. Arguably, it imposes a more stringent burden of proof on a plaintiff who seeks a future care award. While a physician need not recommend the precise treatment or item sought, the reasonableness and necessity of the award must be grounded in the medical evidence adduced at trial.

27. Whether *Gregory* has indeed changed the theoretical approach to proving entitlement to a future care award will likely be litigated in the future.

28. In *Degennaro v. Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319, the Ontario Court of Appeal also emphasized the importance of proving the facts underlying a claim for cost of future care.

29. In that case, the trial judge had adopted the recommendations contained in a report from a forensic accountant. No one ever testified to the truth of the assumptions that underlay the report. The Court found that there was “virtually no evidence” adduced at trial of in support of the claim for home
maintenance work, substantially reducing the award as a result. For the Court, Rouleau J.A. made the following observation:

32 … It is not unusual for counsel, at the outset of a civil trial, to mark one or more volumes of bound documents as exhibits. These are normally marked as exhibits subject to proof. This will often allow for a better and more orderly management of the exhibits filed at trial. This case highlights the importance of ensuring that, at the conclusion of the trial, the status of the many documents contained in those volumes is clear (i.e. whether they have been proven and can be relied on by the trial judge in reaching a decision). This is particularly so where, as in this case, they are referred to and relied on in final submissions and they are critical to the quantification of the claim for costs of future care.

30. In another decision, released two weeks before Gregory, the Court of Appeal suggested that a dose of “common sense” must be injected into the assessment of future care awards.

31. In Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135, Mr. Penner was awarded $120,325.00 under this head of damages, on the basis of a report prepared by an occupational therapist, which included sums for cold packs, heating pads, bath mats, and safety bars until the plaintiff reached the age of 80. On appeal, Newbury J.A. reduced the award, noting that “a little common sense should inform claims under this head, however much they may be recommended by experts in the field.”

32. On this point, the Court cited the following comments of Johnston J. in Travis v. Kwon, 2009 BCSC 63 with approval:


[110] While such 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.

[111] 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 nature or result.

33. *Gregory* and *Penner* were cited by Mr. Justice Willcock in *Harrington v. Sangha*, 2011 BCSC 1035 at para. 210 as authority for “making an award at variance with the recommendations of some of the expert witnesses”, in favour of common sense.

34. Most recently, Mr. Justice Meiklem has confirmed that common sense militates against awarding a Plaintiff a “gold plated” regime of treatment for cost of future care. In *Jarmson v. Jacobsen*, 2012 BCSC 64, the Plaintiff was involved in a motorcycle accident. Although he sustained serious injuries and was awarded significant damages at trial, his claimed damages for cost of future care was met with skepticism.

35. In criticizing the expert evidence on this point, Meiklem J. held:

[115] 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.

... 

[119] Ms. Landy’s Life Care Plan is not just a Cadillac; it is a gold-plated one, which goes far beyond what is reasonable. For example, her recommendation of one-to-one rehabilitation support for 10 hours weekly, (essentially to replicate what his wife, who has been his constant workout partner, has always done) is unsupported by medical opinions other than her own, and would cost $21,600 per year. The present value of that expense alone is over $338,000. With all its shortcomings, I cannot accord Ms. Landy’s recommendations very much weight in my assessment, other than to provide a checklist for comparison and thoroughness.

**ii) Reasonableness**

36. In *Brito v. Woolley*, 2001 BCSC 1178, aff”d on other grounds 2003 BCCA 397, Sinclair Prowse J. wrote the following regarding the test of “reasonableness”:

[422] To meet the test of reasonableness, the proposed expenditure should be reasonable "in the sense of what future care items were necessary in the context of the plaintiff’s specific limitations": Macdonald (Guardian ad litem of) v. Neufeld (1993), 17 C.C.L.T. (2d) 210 at 210 (B.C.C.A.),

[423] In Anderson (Committee of) v. James, (1992), 63 B.C.L.R. (2d) 176 (C.A.), Locke J.A. (for the Court) quoted the following with approval from Oliver v. Ashman, [1961] 3 All E.R. 323 (C.A.):

Where a plaintiff has been rendered helpless by his injuries, which have been caused by the defendant's negligence, the sum awarded as compensation should be sufficient to ensure that he will be properly looked after by others in any situation which can reasonably be foreseen, so that even rather improbable contingencies will be covered.

He went on to say:

... Of course, that does not mean that compensation should be made on the assumption that the worst set of possibilities that can be predicted will, in fact, occur, but it means that some allowance should be made for mere possibilities and that a purely mathematical application of assumed percentage possibilities would be losing track of the purpose of the damages and the nature of the exercise of judgment inherent in assessing damage awards...

[424] Overall, an award for cost of future care "must be moderate, and fair to both parties ... What is sought is compensation not retribution": Andrews v. Grand & Toy Alberta Ltd., supra. Moderation, however, does not mean reducing the Plaintiff to a subsistence level: Dube (Litigation Guardian of) v. Penlon Ltd. (1994), 21 C.C.L.T. (2d) 268 (Ont.Ct.Gen.Div.).

[425] Therefore, with respect to each of the claims for costs of future care, the Plaintiffs must prove:

(a) that the proposed expenditure is medically justified and reasonable in the context of Elliott's specific limitations; and

(b) that the quantum of the proposed expenditure is moderate and fair to both parties.

37. In a more recent decision, Forde v. Inland Health Authority, 2010 BCSC 91, Sinclair Prowse J. provided the following comprehensive summary of the law on this point:

[225] In determining future costs of care awards, three elements must be considered – entitlement to be compensated for the proposed cost, the duration of the incursion of that cost, and the level of the care to be provided.
As far as entitlement is concerned, a plaintiff is entitled to be compensated for all expenses arising from the injuries that are medically justified and reasonably necessary to preserve their health: Milina v. Bartsch 1985 CanLII 179 (BC S.C.), (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff’d reflex, (1987), 49 B.C.L.R. (2d) 99 (C.A.).

In determining whether an expense is medically justified, it is not necessary to have it confirmed by a medical doctor: Frers v. De Moulin, 2002 BCSC 408 (CanLII), 2002 BCSC 408. For example, a paramedical specialist (i.e. a rehabilitation consultant) may provide evidence of future care requirements where they possess the “experience, skill and training” to provide expert evidence concerning the specific care required to sustain or improve the mental or physical health of the plaintiff: Jacobsen v. Nike Canada Ltd. 1996 CanLII 3429 (BC S.C.), (1996), 19 B.C.L.R. (3d) 63 (S.C.).

In determining whether the incursion of a future cost is reasonable, the Court must consider whether a reasonably-minded person of ample means would be ready to incur the expense: Ediger v. Johnston, 2009 BCSC 386 (CanLII), 2009 BCSC 386. An aspect of this determination is the amount of the proposed expense which, in turn, involves a consideration of the level of care to be provided.


The existence of government benefit schemes may also be a consideration in determining whether it is reasonable to incur a particular expense. If a government benefit scheme is only available to plaintiffs who receive no tort compensation, entitlement to compensation for that future care cost should be made without any consideration of the benefits received from the government program: Fullerton v. Delair, 2006 BCCA 339 (CanLII), 2006 BCCA 339. However, if the government benefit scheme is available regardless of tort compensation, the scheme must be taken into consideration when determining the award: Krangle. A government benefit scheme, therefore, is a factor in determining the plaintiff’s available level of care.

As far as duration is concerned, the Court must determine whether it is a one-time expense, an expense for a given period of time
(for example, the next 10 years), a periodic expense (for example, every 5 years), and/or a lifetime expense (that is, an expense that will be incurred for the rest of the plaintiff’s life). A lifetime expense, in turn, requires the Court to consider the likely post-accident life expectancy of the plaintiff: Mitchell v. We Care Health Services Inc., 2004 BCSC 902 (CanLII), 2004 BCSC 902.

[232] In making these determinations, the Court must consider all real and substantially possible contingencies and make adjustments to the final award in accordance with the likelihood of their occurrence: York v. Johnston 1997 CanLII 4043 (BC C.A.), (1997), 37 B.C.L.R. (3d) 235 (C.A.).

[233] Lastly, a flow of income to cover future costs of care will probably be subject to income tax. Therefore, the future cost award should be in an amount that is sufficient to provide for these costs after the taxes have been paid.

38. In Bystedt (Guardian at litem of) v. Hay, 2001 BCSC 1735, aff’d 2004 BCCA 124, D. Smith J.(as she then was) said at paras. 162-163:

[162] The test for an award of future care 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": Brennan v. Singh, [1999] B.C.J. No. 520 (S.C.). In formulating this test Harvey J. referred to the decision of Zapf v. Muckalt, (1996), 26 B.C.L.R. (3d) 201 (C.A.), where Donald J.A. stated at para. 36:

I think the proper test is reasonableness and that the psychological and emotional factors influencing the choice of where to live must be considered: Andrews v. Grand & Toy Alberta Ltd... Medical necessity is too stringent a test.

[163] Thus, the claim must be supported by evidence that establishes the proposed care is what a reasonable person of ample means would provide in order to meet what the plaintiff "reasonably needs to expend for the purpose of making good the loss": Janiak v. Ipolito (1985), 16 D.L.R. (4th) 1 (S.C.C.), at 17, quoting from the decision of Darbishire v. Warran, [1963] 1 W.L.R. 1067 at 1075. It must also be based on an objective test of what is moderate and fair to both parties: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.); and, Andrews, supra. As stated in Andrews, at page 235, "What is being sought is compensation not retribution." Similarly, in Sigouin (Guardian ad litem of) v. Wong (1991), 10 C.C.L.T. (2d) 236 Melvin J. stated at p. 281:
... An award [for future care] must not take the form of retribution or punishment of the tortfeasor, but should reflect the needs of the plaintiff as demonstrated by the evidence.

39. Thus, an award should draw an appropriate balance between providing the necessary care for a plaintiff to enjoy a quality lifestyle and complete pampering: *Aberdeen* at para. 142.

40. However, it is clear that the quantification of this award is not an “exercise in saving money”. In *Williams v. Low*, 2000 BCSC 345, Morrison J. wrote:

> [25] This is not an exercise in how to save money. This is an analysis of how best to compensate the plaintiff for her grievous injuries and her loss of quality of life that occurred through no fault of her own but, rather, because of the negligence of the defendant. This is not a discussion of retribution but, rather, one of compensation.

41. Similarly, in *Cojocaru (Guardian ad litem) v. British Columbia Women’s Hospital*, 2009 BCSC 494, rev’d on other grounds, 2011 BCCA 192, Groves J. wrote:

> [306] The law does not permit the defence to argue that Eric Cojocaru should “get by” with less than “full compensation”. Nor does the law permit the defence to pass off the responsibility of the defendants to provide appropriate future care by suggesting that Eric Cojocaru can and should rely on his mother and his brother to take care of him. Furthermore, Eric is not required to “make do” with government subsidized programs, be it within the school system or charitable organizations, such as the Variety Club, to provide him with the additional support and equipment he needs. While this cheaper approach to future care may benefit the defendants, it is not what the law provides for. In the words of Dickson J. at 246 in Andrews: “justice requires something better”. Dickson J. was referring to “full compensation” for future cost of care.

42. For this reason, it has been found that future care awards do not need to be reduced to take into account that family is assisting in care giving. In *O’Connell v. Yung*, 2010 BCSC 1764, Madam Justice Fisher stated:

> [124] I do not accept the defendants’ submission that an award for the cost of future personal care must be reduced to take into account the role Mr. O’Connell plays in providing supervision and guidance to Ms. O’Connell. Ms. O’Connell is entitled to be compensated for the cost of care that is medically required. As Groves J. held in Cojocaru, the law does not permit the defendants to pass off their responsibility to provide appropriate future care by suggesting that Ms. O’Connell can and should
rely on her husband to take care of her. A husband is not expected to care for his injured wife on a gratuitous basis: see Andrews at p. 243.

[125] The same principle was expressed in Vana v. Tosta, [1968] S.C.R. 71, where one of the issues involved an award for the cost of future housekeeping services. The majority of the court stated at p. 75:

It is trite law that a wrongdoer cannot claim the benefit of services donated to the injured party. In the present case it amounts in my judgment to conscripting the mother and mother-in-law to the services of the appellant and his children for the benefit of the tortfeasor and any reduction of the award on this basis is and was an error in principle.

43. Similarly, it has been held that PharmaCare benefits are not deductible form a cost of future care award: Harrington v. Sangha, 2011 BCSC 1035 at paras. 157-162.

44. Thus, a plaintiff is entitled to a relatively high standard of care. In Spehar v. Beazley, 2002 BCSC 1104 at para. 55, aff’d 2004 BCCA 290, Koenigsberg J. accepted that “the authorities support awards of compensation that will provide a reasonably high standard of future care for injured plaintiffs… full compensation suggests a standard of care which allows the plaintiff, as far as possible, to enjoy a lifestyle like the one he or she would have enjoyed but for the injury.”

45. Cooper-Stephenson states the following at pg. 411:

The establishment of this very high standard of post-accident care means that plaintiffs can claim almost any anticipated expense that will facilitate their health, including both their physical and mental welfare.

**iii) A third requirement: The item will actually be used**

46. Additionally, it has been held that there should be evidence that a plaintiff will actually incur the expenses before damages will be awarded. In Izony v. Weidlich, 2006 BCSC 1315, Masuhara J. observed:

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally Krangle). I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see Courdin at para. 35), or for items or services that it is unlikely he will use in the future.
47. A similar approach was recently taken by Kelleher J. in *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111. In that case, the Court declined to award the plaintiff damages for items which it considered it unlikely she would avail herself of in reality.

48. To similar effect is *Predinchuk v. Spencer*, 2009 BCSC 1396, where Balance J. held:

> [141] Ms. Predinchuk seeks compensation for chiropractic treatments and massage therapy into the future to assist her in coping with her ongoing pain, stiffness and discomfort. She also asks for compensation to cover the pulsed signal therapy treatment recommended by Dr. Hershler as a one-time expense.

> [142] There is no evidence that Ms. Predinchuk is interested in or otherwise prepared to subject herself to the pulsed signal therapy. Therefore it cannot fairly be said that she will likely incur that expense. Consequently, it is not awarded.

> [143] Although Ms. Predinchuk had some massage therapy treatments in the earlier stages of her injury, there is no evidence to suggest that she pursued or was interested in pursuing that modality. Accordingly, the evidence does not support an award for the cost of that future treatment. The evidence does, however, support Ms. Predinchuk’s claim for the cost of a future chiropractic treatment. Many of the medical experts called by Ms. Predinchuk recommended that she continue to receive chiropractic treatment into the future. Even Dr. Bishop agreed that they can be beneficial for the management of chronic pain.

49. In fact, courts have sanctioned post-judgment applications to have the care award reduced based on new evidence showing that the plaintiff has not in fact been incurring a certain expense for which an award was granted: See for example *Strachan v. Reynolds*, 2006 BCSC 362. In *Coulter (Guardian Ad Litem of) v. Ball*, 2005 BCCA 199, the Court of Appeal was asked to admit fresh evidence in circumstances where the trial judge had awarded damages for the cost of future care on the basis that the Plaintiff would live in a supervised living environment, with an attendant for four hours per day and a team of other practitioners who had been working with him.

50. The Defendant sought to introduce fresh evidence on developments which had occurred after the completion of the trial. The Plaintiff did not voluntarily go into the supervised living home proposed at trial, but only entered a supervised living facility as part of the terms of the probation order following a guilty plea to a criminal offence. The fresh evidence sought to
be adduced was that he was resistant to a supervised living environment and it was unlikely that he would in fact live there. The Court of Appeal allowed the new evidence and set aside this portion of the award, on the basis that the evidence of events after the trial raised serious doubt that the Plaintiff would voluntarily live in a supervised environment, remitting this aspect of damages to the trial judge for reassessment.

Approaches to Quantification

51. The approach to quantifying an award for cost of future care is succinctly summarized in Christopher Bruce, *Assessment of Personal Injury Damages*, 4th ed. (LexisNexis Butterworths, 2004) at pg. 43:

The calculation of the lump sum award for the costs of future care is undertaken in a manner that is very similar to that which is used to calculate loss of future earnings. First, the base year annual cost is calculated. Next, a growth rate is applied to this figure in order to determine the manner in which costs will change over the future; and a time period is specified during which the loss is to be incurred. Finally, these factors are combined with assumptions concerning the discount rate and life expectancy to obtain a lump sum value of the award.

The most important difference between the calculation of loss of earnings capacity and that of costs of care concerns the treatment of the taxes that are levied on investment income. Whereas the courts have ruled that no allowance is to be made for the taxes that are charged on income that derives from investment of a lump sum award for loss of earnings, they have ruled that such allowance is to be made when the income derives from investment of an award for costs of care. When this allowance is made the award is said to be “grossed up” for income taxes.

52. In Klar, Linden, Cherniak, & Kryworuk, *Damages and Remedies in Tort* (Carswell, 1995), the authors state the following at §56:

This head of damages [cost of future care] is the post-trial equivalent to that dealing with expenses incurred prior to trial. It is commonly known as the cost of future care and covers all expenses which would not have been incurred but for the injury. It includes the future cost of medical treatment and other expenses required to provide the plaintiff with the lifestyle enjoyed prior to the injury. Generally, the cost of future care takes into consideration the following factors: i) the cost of care; ii) the duration of the expense; iii) contingencies; iv) the discount rate; and v) the overlap factor.

53. Additionally, as Cooper-Stephenson points out at pp. 441-42:
The claim for future cost of care must first be divided as between (1) initial capital outlay, and (2) ongoing expenses. This is particularly important because, whereas the initial capital outlay will be calculated as a straightforward lump sum, the ongoing expenses must not only be discounted to present value, but grossed-up to deal with taxation of interest.

As for the ongoing expenses, there are two methods of calculation: either (a) the “fixed life expectancy” method: estimating the post-accident life expectancy and determining the expenses that will be incurred within the remaining period of the plaintiff’s life; or (b) the “year-by-year” method: determining the expenses that will be incurred during any given year and estimating the likelihood that the plaintiff will live to that particular year.

54. In non-catastrophic injury cases where there will be recovery, rental as opposed to purchase of the initial capital item may be justified; conversely, the Court should consider deducting the residual value of the asset acquired at the end of the period of the loss from the initial award of damages: Cooper-Stephenson at pg. 443.

Duration of the Expense

55. For the temporarily disabled, the duration of the expense refers to the period of recovery. For the permanently disabled, the duration of the expense is measured by the plaintiff’s life expectancy, based on his or her post accident condition: *Damages and Remedies in Tort*, §61.

56. Where the plaintiff’s life expectancy has been shortened, it is the shortened lifespan which constitutes the period of claim for costs of future care, as there will be no increased costs following death: *Cooper-Stephenson* at pg. 447. In *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735 at para. 154, aff'd 2004 BCCA 124, D.M. Smith J. held:

In the case of severe and permanent injuries, the costs of care must be assessed for as long as they will be required by the plaintiff. In contrast to the method adopted in regard to lost income, the figure used is the actual post-accident life expectancy. Experts utilize statistical, actuarial, and medical models to predict the plaintiff's remaining lifespan after the accident. Generally, an annual figure is settled upon and awarded for the remaining life expectancy of the plaintiff.
Contingencies

57. At pp. 449-450, Cooper-Stephenson points out that the contingencies involved in an award of future care costs differ from those affecting an award for loss of earning capacity:

It is now clear that contingencies under damages for cost of future care should be given separate consideration from those relating to future loss of earnings. The analysis under the claim for cost of care is done for a different reason: “The ‘contingencies and hazards of life’ in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. The inquiry under the two heads of damage has a different focus. Whereas the concern under loss of earnings is mostly into “what would have been, but for the accident”, the cost of care inquiry is into “what will now occur, as a result of the accident”. Of course, some of the contingency question under loss of earnings may relate to the plaintiff’s post-accident prospects. Equally, there may be cases where a contingency reduction is justified under cost of care because of the possibility that a similar expense would have been incurred anyways, without the accident.

58. In *Damages and Remedies in Tort*, the authors state the following at §76:

… Contingencies affecting damages for cost of future care relate to the duration of the expense and the possibility that the plaintiff will not require the anticipated level of care for the estimated length of time, for example, the possibility that the plaintiff’s deteriorating condition would require institutional rather than home care.

59. However, contingencies are not always negative. Contingencies may justify an increase in damages rather than a deduction: *Lewis v. Todd*, [1980] 2 S.C.R. 694. In *Morrison (Committee of) v. Cormier Vegetation Control Ltd.*, [1998] B.C.J. No. 3279 (S.C.), and *Mitchell v. We Care Health Services Inc.*, 2004 BCSC 902, Boyd J. and Kelleher J. respectively added a positive contingency of 15% and 5% for the fact that the contingencies were in one direction, that is, that the plaintiff’s circumstances would become worse and require further care.

The Problem of Overlap: The Additional Expense Approach and Total Lifestyle Approach

60. An issue that arises in traumatic brain injury cases is overlap between the cost of care and damages for loss of future income, specifically with regard
to how to handle expenses for basic necessities of life the plaintiff would have incurred regardless of the accident. In *Watkins v. Olafson*, [1989] 2 S.C.R. 750, McLachlin J. wrote:

In calculating loss of future earning capacity in cases where an award for future care is made, a deduction is made from the award for lost earning capacity for living expenses to avoid duplication between the two heads of damage.

61. At pp. 533-34, Cooper-Stephenson writes:

It is now recognized that damages cannot simply be assessed under the separate heads and then totalled. There may be duplication and overlap, and if so there must be an adjustment in the overall award. Furthermore, in certain circumstances there may be a reduced need for income or an offsetting advantage that may have to be accounted for in the total award, if the plaintiff’s post-accident situation actually requires fewer resources to sustain itself or is in someway more beneficial than the pre-accident situation.

62. The issue was addressed by McLachlin J. (then a trial judge) in *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, aff’d 49 B.C.L.R. (2d) 99 (C.A.):

It is established that overlap, or double compensation, must be avoided. The question is whether the court should proceed by first assessing the total cost of future care, including basic living expenses which the plaintiff would have incurred had he not been injured, and make a deduction from the award for loss of future earnings to reflect the fact that a portion of those earnings would have been spent on items included in the award for cost of care had the plaintiff not been injured [total lifestyle approach]; or whether, on the other hand, the court should proceed by awarding under the head of cost of future care only those expenses which the plaintiff establishes he will incur over and above what he would have spent for living had he not been injured [additional expenses approach].

63. In *Andrews*, Dickson J. acknowledged that “it is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.”

64. Dickson J. then described the two approaches to this problem as follows, providing the genesis for the “total lifestyle approach”:
When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: i.e. the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: i.e. to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.

65. In the trilogy, the total lifestyle approach was applied in Andrews and in Thornton. However, Arnold proceeded on the basis of awarding only additional costs. In Andrews, Dickson J. had this to say regarding the application of the total lifestyle approach on the facts of that case:

The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.

The costs of necessaries when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings.

66. In Damages and Remedies in Tort (Carswell, 1995), the authors describe these two approaches at §81:

In most cases the possibility of duplication involves the following dilemma: while costs of care often includes the cost of basic necessities, the plaintiff would have had to pay for those necessities even if the injury had not occurred. Thus, if loss of income is not a factor, the award for cost of future care will be reduced by the amount which the plaintiff would have spent on basic necessities if the injury had not been sustained. Where loss of income is a factor, the court must avoid the duplication which would arise if the full cost of future care is awarded and full compensation is granted for loss of earning capacity. There are two approaches to avoiding such duplication: i) the award for future care is made without
deduction for the cost of basic necessities and the cost of such necessities is deducted from the award for loss of earning capacity; of ii) the cost of basic necessities is deducted when computing damages for future care and the loss of future income is calculated on the basis of gross earnings. When the later approach is used, the cost of future care is assessed as the cost which the plaintiff will incur in addition to what he would normally have spent on basic necessities. When the former approach is used, the award for loss of future earnings is typically reduced by 50 per cent. In addition to deducting personal living expenses from the award of loss of earning capacity for the years the plaintiff is projected to live, a similar deduction must be made from the award for the ‘lost years’ a plaintiff could have been expected to work if his or her life had not been shortened by injuries.


68. In *Milina*, McLachlin J. said the following regarding these two competing approaches to quantification:

I begin by making two observations. First, if the calculations are done correctly and account taken of all relevant factors, it should not matter which procedure is adopted. This leads to a second observation – that the goal of this aspect of an award of damages for personal injuries is *restitutio in integrum* – to restore the plaintiff in so far as possible to the position he would have been in had he not been injured. Restitution is accomplished by restoring to the plaintiff what he has lost. That must be the ultimate measure of damage, regardless of the particular approach adopted.

In Andrews, supra, and Thornton, supra, the Supreme Court of Canada followed the method of calculating the plaintiff’s total cost of care, including basic living expenses, and deducting from the award for lost earnings the percentage which would have been spent upon such expenses. In Arnold v. Teno, supra, the third case in the trilogy, it proceeded by the second method of allowing for future care only the additional costs which arose from the injury, and allowing the full award for lost earning capacity.

It therefore appears that either method is acceptable, depending on the nature of the case and the evidence adduced. Cooper-Stephenson and Saunders in *Personal Injury Damages in Canada* (1981), stated at p. 279:

This approach very much depends upon the evidence adduced at trial. Thus in Arnold v. Teno such evidence related only to additional costs
beyond the norm ... In a sense, no question of duplication arose and the plaintiff was awarded full loss of earnings from which she would then be able to provide for herself the basic necessities of life in the same way as if she had not been injured.

In the case at bar, evidence has been presented sufficient to permit calculation on either basis. The plaintiff has presented evidence of what it will cost to maintain him (and his dependents to some extent) in a home environment for the rest of his life. The defence has presented evidence of the additional living expenses which the plaintiff will incur because of his injury. The court must therefore decide between the two approaches.

In my view, the "total lifestyle" approach is appropriate where the plaintiff's entire future life has been radically changed because of his or her injury. In such a case, it is artificial to speak of "additional" costs resulting from the injury. The plaintiff needs a totally different environment and totally different care than he would have required had he or she not been injured. The simplest and fairest approach is to award him all these costs and make a deduction from loss of future earnings for what would have been spent on basic necessities.

The "additional expense" approach is preferable where the plaintiff will continue to lead basically the same life as he would have led had he not been injured, with the aid of additional assistance and physical facilities. In such a case, the simplest way of calculating the loss caused by the accident is by totalling the cost of the extra assistance and facilities which the plaintiff will require.

Cooper-Stephenson and Saunders, at p. 279, advocate this approach in such circumstances:

... in the large majority of cases no claim will be made in respect of basic necessities under the cost of care. If only limited or sporadic hospitalization is contemplated, it is likely that evidence will be adduced only as to the additional expense involved. This will be so particularly if the home environment remains substantially intact, and the post-accident income level relatively constant.

69. On the evidence before the Court, Madam Justice McLachlin concluded that in its essential features, the plaintiff's life in his injured state would parallel his life as he would have lived it had he not been injured; thus, "the simplest and most accurate way of measuring his loss under the head of future care in these circumstances is by awarding him the additional costs which stem from his injury."
70. Cooper-Stephenson summarizes the appropriateness of these competing approaches in some detail at pp. 539-41, noting that the additional expense approach is used in the majority of cases, and that the total lifestyle approach has been used “in a limited number of reported cases involving very serious injury”.

71. In Brown, *Damages: Estimating Pecuniary Loss* at pg. 10-27, the author notes that:

As pointed out in *Milina*, if the calculations for cost of future care are properly assessed, it should not matter which of the two approaches is taken. However, for all practical purposes, it is extremely rare that the total lifestyle approach is used to assess cost of future care. One can speculate what the reasons might be for the reluctance to use the total lifestyle approach. The cost of care expert’s professional fees will be significantly higher to assess cost of future care using the total lifestyle approach. Furthermore, all future care assessments are predicated on the “additional expenses” approach where the expert assesses what items or services the plaintiff requires to have a lifestyle approximating that which he/she had prior to the accident.

72. At pg. 538, Cooper-Stephenson also suggests that the outcome should be the same regardless of which approach is applied. However, he notes that other academics have suggested the “total lifestyle approach” is more plaintiff friendly, for the following reason:

This approach… will usually work to the plaintiff’s advantage because of the often, somewhat speculative nature of the loss of income claim and the requirement that 100% of future care costs including living expenses be awarded. Of course, when they are included as future care costs, they will be reduced by the impaired life expectancy but any such reduction is usually more than offset by the gross up for income tax which is not a feature… of loss of income.

He further notes at pg. 545:

Even if all other issues can be computed in a way which will produce the same result irrespective of whether the *Teno* or *Andrews/Thornton* approach is used, a difference between the approaches emerges with respect to the impact of taxation. This is because the taxation issue is dealt with differently under the head of loss of earnings than under cost of care…

If the *Teno* [additional expenses] approach is used, the amount that the plaintiff would have spend on basic necessities will form part of the award
for loss of earnings and will not be grossed up. On the other hand, if the Andrews/Thornton [total lifestyle] approach is used, the plaintiff will receive a diminished loss of earnings award and will receive the amount representing basic necessities as part of cost of care, and this will be grossed up for tax on interest. This approach is therefore more favourable to the plaintiff because it leaves the plaintiff with the advantage of both a before-tax earnings calculation (with only a net-deduction of costs) as well as a tax gross-up of those costs. The Teno method of calculation therefore again appears more accurate on this count.

73. At pp. 543-44, Cooper-Smith sets out three variables to determine the appropriate deduction from an award of future income loss to avoid overlap: (1) income level (the lower the income the greater proportion would be spent on basic needs); (2) family situation (numerous dependents mean a greater proportion is spent on basic needs); and (3) period of loss (the plaintiff’s family size over the entire period of the loss is relevant).

74. It is clear that the total lifestyle approach is not often used by the Courts. A Quicklaw search for the phrase “total lifestyle approach” carried out on January 9, 2012 returned 11 hits, all of which are British Columbia decisions. The following is a review of the relevant decisions we have found where this approach is discussed.

75. In Morrison v. Pankratz, [1992] B.C.J. No. 2853 (S.C.), the plaintiff lived in an institutional setting prior to the accident, as a result of a pre-existing mental condition. Cowan J. referred to Milina, and concluded that the plaintiff’s post accident state would remain much the same: she would live in an institutional setting. Accordingly, the additional expense approach was applied.


61 The plaintiff is entitled to recover costs she will incur as a result of her injuries. Cost of future care must be supported by some medical evidence and the claims must be reasonable. Damages are not awarded for the purpose of making the plaintiff's life more bearable or enjoyable. Two approaches to future care are discussed in the authorities. The first, "total lifestyle" approach, is reserved for a situation where a plaintiff's entire future life has been radically altered. The second, "additional expense" approach, is appropriate in this case where the plaintiff will continue to lead basically the same life as she would have led, with the aid of additional assistance…
In *Morrison (Committee of) v. Cormier Vegetation Control Ltd.*, [1998] B.C.J. No. 3279 (S.C.), the total lifestyle approach was applied by Boyd J. On the law, Madam Justice Boyd made the following remarks:

111 Further, Mr. Webster has submitted that in a case in which catastrophic injuries have been suffered and in which the plaintiff's entire future life has been radically changed because of her injury, it is appropriate for the Court to adopt the "total lifestyle" approach in assessing her damages for cost of future care. According to this method, the injured party is given:

...an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings, i.e., the award is on the basis of net earnings and not gross earnings. (See Andrews v. Grand & Toy Alberta Ltd., at p. 468 (see p. 28 Plaintiff's Argument).)

112 This is in contrast with the alternative "additional expenses" approach, adopted by the defence, in which the Court deducts the costs of basic necessities when computing the award for future care and then computes the earnings award on the basis of gross earnings.

113 Here, I am satisfied that a total lifestyle approach is appropriate since I have predicted Charm will not work and will always, to some degree, live within the parameters of various care-givers' supervision.

When applied to the facts, the following conclusion was reached:

128 Adding together the wage loss of $401,651 and the award for the loss of benefit of marriage of $185,100, results in a total loss of $586,751.

129 Adopting the "total lifestyle approach" and deducting from this gross figure the sum of $310,920 (Mr. Carson's calculation of the basic costs of living for females of Ms. Morrison's age living with Paris to age 20 and then alone), leaves a net claim of $275,831. I accept Mr. Carson's opinion that regardless of whether Charm had married and lived in a 2 or 3 person household, these figures would require minimal adjustment. Accordingly I have made no further adjustments of this figure (Carson Report at Ex. 1a, tab 173).

In *Coulter v. Ball*, 2002 BCSC 1740, cost of future care was calculated in accordance with the total lifestyle approach.

After Ross J. had given reasons, the defendants brought an application for a reduction in the award because of duplication between the loss of earning
capacity and the future care claim. The award included a daily charge of $29 for room and board. The parties agreed that the award for future care should not have included an amount for room and board since it was a basic necessity of life and not attributable to the injuries. Evidence showed the average for room and board for an average income earner was $48 per day. The plaintiff argued that the $29 daily figure should be the basis of the deduction from the future care award because the award was made up of the aggregate costs of future care. The defendant argued that the $48 average cost of room and board for average income earners should be the basis of deduction because the award was made on the basis of a whole lifestyle approach.

81. Ross J. granted the application, and the reduction was calculated on the $48 figure. On the appropriateness of the total lifestyle approach, Her Ladyship wrote:

15 I have concluded that the total lifestyle approach is the appropriate method to be adopted in the circumstances of this case. In this case the basis of the award was that Mr. Coulter's entire future life had been radically and permanently changed as a consequence of his brain injury. In particular, the foundation of the award for future care was that he required a fundamentally different environment to ensure his safety and the safety of others. In such a case, following Milina, supra, the total lifestyle approach is the appropriate approach to be adopted. Moreover, the adoption of that approach, in my view, in the circumstances of this case, is fair to all the parties while preserving the paramount concern, namely, future care.

82. In Mitchell v. We Care Health Services Inc., 2004 BCSC 902, at para. 86, the plaintiff had suffered a traumatic injury that caused a dramatic change in lifestyle. The defendants argued that the total lifestyle approach should be utilized. At para. 90, Kelleher J. held that “there is no need to use the total lifestyle approach here. That is because the award for cost of future care, explained below, does not include basic living expenses that the plaintiff would otherwise have incurred.”

83. The approach was most recently applied by Ehrcke J. in MacEachern v. Rennie, 2010 BCSC 625. In that case, the plaintiff took the position that she would not pursue a loss of earning capacity claim if the court adopted the “total lifestyle approach”. In that case, the Court found that no matter what had happened, the plaintiff would have adjusted her lifestyle to match her available income. Thus, her basic living expenses would consume 100% of
any income she would have earned. Additionally, as a result of the accident, her ordinary living expenses would of necessity be higher than they otherwise would have been. The plaintiff was a drug addict who had been living in a tent at the time of the accident.

84. In the light of these “unusual circumstances”, the Court acceded to this submission, reasoning as follows:

[701] The proposition that the Total Lifestyle approach will achieve the same result is based on the assumption that a deduction will be made from the income loss award for the cost of ordinary living expenses. An unusual feature of the present case, however, is that the plaintiff asks the court to adopt the Total Lifestyle approach for the cost of future care, in which case she will not pursue her claim for loss of future income.

[702] The defendants submit that since the cost of ordinary living expenses cannot be deducted from future income loss in this case, the Incremental approach should be adopted. Alternatively, if a Total Lifestyle approach to cost of future care is used, then a deduction should be made from that award for all amounts attributable to ordinary living expenses. The defendants submit that only by so doing will the principle of restitutio in integrum be respected.

[703] An important feature of the present case is that the plaintiff’s ordinary living expenses cannot be the same as they would have been apart from the accident. This is so for two reasons. First, according to the expert evidence, her life expectancy is now substantially longer than it would have been but for the accident. She will thus incur ordinary living expenses for several additional years, and this is an incremental expense for which she is entitled to compensation.

[704] More important, from the time of the accident until the end of her life, her ordinary living expenses must of necessity be higher than they otherwise would have been. This is so because at the time of the accident, she was living in a tent, where her daily living expenses were extremely modest. As a result of the accident, however, she cannot receive the medical care she requires while living in a tent. Thus, as a matter of medical necessity, she now has ordinary living expenses at a far higher level than she would have required but for the accident. That higher level is an incremental expense, attributable to the accident, for which she is entitled to compensation.

[705] The defendants submit that the way to deal with those problems is to estimate what her income would have been from time to time, what her ordinary expenses would have been from time to time, and then deduct
those expenses from her award for future care, while compensating her for whatever loss of future income can be established.

[706] As I have previously suggested, no one would be able to predict with any degree of certainty what trajectory the plaintiff’s life would have taken in the months and years following September 2005 if it had not been for the accident. There are many possibilities. At one extreme, she might have died very young of a drug overdose. At the other end of the spectrum, she might have gone into a rehabilitation program, overcome her drug problem, and returned to work in the medical field earning a respectable income. In between those possibilities, one could imagine an endless number of scenarios.

[707] The plaintiff invites the court to find that whatever trajectory her life would have taken, she would have continued the pattern that she displayed in her life prior to the accident, namely, she would have adjusted her lifestyle to match her available income. The plaintiff’s decision not to pursue her claim for future income loss is thus equivalent to saying that whatever a proper award for future income loss would have been, the proper deduction for ordinary living expenses would have been 100%. That position is supported by the available evidence. It is consistent with the way the plaintiff structured her life in the years before the accident. If anything, this approach is unduly favourable to the defendants, as it assumes that no matter how well her life might have turned out, her income would never have exceeded her basic living expenses. The evidence does not support the defendants’ submission that the plaintiff was in a deficit position.

[708] I am satisfied that in the unusual circumstances of this case, the approach advocated by the plaintiff is correct. I find as a fact, based on the plaintiff’s past history, that regardless of how long she would have taken to recover from her drug addiction and regardless of what kind of employment she might have secured in the future, one thing that can be predicted with some confidence is that she would have continued to match her lifestyle to her available income. That being the case, restitutio in integrum will be achieved by providing a cost of future care award that provides for all her medically justifiable expenses including those of ordinary living, while giving her no award for loss of future income. This approach takes into account the two unusual features of this case: first, that as a result of her accident, the plaintiff’s future living expenses will, for medically justifiable reasons, be far different from what they otherwise would have been (she cannot receive proper medical care while living in a tent), and second, that she is someone who, but for the accident, was content to adjust her living standards to match her available income.

[709] To this I must add one caveat. The plaintiff’s award for the cost of future care must be assessed according to what is reasonably necessary
on the medical evidence to promote her mental and physical health, and should not include amenities for which she is already being compensated under the head of non-pecuniary damages.

**Overlap Between Cost of Future Care and Non-Pecs**

85. It should also be kept in mind that there may be an overlap between non-pecuniary damages and what a plaintiff seeks as costs of future care. As McLachlin J. made clear in *Milina*, an award of damages for cost of future care should not take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should only reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health.

86. Thus, in *Whetung v. West Fraser Holdings Ltd.*, 2007 BCSC 990 at para. 49, Grist J. rejected a claim for a sauna to alleviate pain because such an item was more akin to an amenity to be paid for out of pecuniary damages.

**Home care vs. Institutional Care**

87. At pg. 422, Cooper-Stephenson states the following on this point:

   The home/institutional care issue was addressed in the trilogy primarily by Dickson J. in *Andrews*. It is a question of mixed law and fact – a question of law as to the general standard of post accident care to which a plaintiff is entitled, and as to the meaning of the notion of “reasonable” expense; a question of fact as to whether, in the circumstances of each case, it is possible to provide care in a home environment, and whether alternative institutional care is a sounder medical choice.

88. In each of the trilogy cases (*Andrews, Thornton*, and *Arnold*), the Supreme Court of Canada concluded that the plaintiffs were entitled to care in a home environment, even though this option would cost as much as four times more than institutional care.

89. In *Lusignon (Litigation Guardian of) v. Concordia Hospital*, [1997] M.J. No. 197 (Q.B.) Jewers J. held that "there is no legal requirement that in these cases home care is mandated and each case must turn on its own evidence and facts."

90. *Lusignon* considered a claim for damages for medical negligence. The plaintiff, fourteen years old at trial, was rendered mentally handicapped and suffered from controllable cerebral palsy. Her life expectancy was 65 years.
Mr. Justice Jewers said that the trilogy 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. Each case must proceed on its own facts. The Court wrote the following:

41 Counsel for the plaintiffs submit that the law requires home care. They state it is settled law that the appropriate standard of care for a seriously injured person is home care versus institutionalized care. They say this was established by the trilogy.

42 In Andrews v. Grand and Toy (1978) 3 C.C.L.T. 225 (S.C.C.), the plaintiff, a young adult, had been rendered a quadriplegic by the accident in question. There was evidence that home care would be preferable to institutional care (auxiliary hospital) and also that the plaintiff did not want to go into an institution. The Supreme Court held that home care ought to be provided. It is true that there are dicta in the case suggesting that home care should be the standard in all cases. The court said:

"The standard to be applied to Andrews is not merely 'provision', but 'compensation', that is what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment or the case of an immobile quadriplegic, the results might well be different; but where the victim is mobile and still in full control of his mental facilities, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better." (p. 239)

43 Nevertheless, as I read the case, the court was not laying down as an immutable principle that home care is invariably the proper standard and left it open for the circumstances of each case to dictate what the level of care ought to be.

44 I am fortified in this view by another trilogy case, Thornton v. Board of School Trustees (1978) 3 C.C.L.T. 257 (S.C.C.). This was a quadriplegic case and there was also evidence that an auxiliary hospital was unsuitable for young people in the condition of the appellant because the age and senility of most of the patients would not be conducive to his mental well being and also because, as he would be able to leave the hospital on outings, there would be an additional burden placed on staff with comings and goings inconsistent with ordinary hospital routine. There the court stated:

"Each case must proceed on its own evidence, but in this case, as in Andrews, on all the evidence such institutional care would be entirely unsuitable for a young, mobile quadriplegic with unimpaired mental faculties. In my opinion, the Court of Appeal erred in principle in failing
to give effect to the evidence as to the standard of care required, and as found by the trial judge." (p. 265)

45 In that case - clearly - the court was stating that each case is to be considered on its own evidence.

46 In another trilogy case, Arnold v. Teno (1978) 3 C.C.L.T. 272 (S.C.C., the infant plaintiff was left with both physical and mental disabilities; there was evidence that there were no institutions or establishments in and around Toronto which could give her the appropriate care; and the court stated:

"On all of the evidence, the learned trial judge came to the conclusion, with which I agree, that the infant plaintiff could only receive the proper care to which she is entitled under the regime advanced by the plaintiff's witnesses, that is, in her own apartment with the attendants which her care requires." (p. 304)

47 But again, in this case, the court seemed to be advertting to the evidence to determine what the level of care should be.


49 In my view, there is no legal requirement that in these cases home care is mandated and each case must turn on its own evidence and facts.

91. However, as Dickson J. pointed out in Thornton v. Prince George School District No. 57, [1978] 2 S.C.R. 267 at 280-81, where a plaintiff has been catastrophically injured, in effect, an onus arises on the defendant to establish “that proper care can be provided in the appropriate environment at a firm figure, less than that sought to be recovered by the plaintiff”:

…before denying a quadriplegic home care on the ground of “unreasonable” cost something more is needed than the mere statement that the cost is unreasonable. There should be evidence which would lead any right-thinking person to say: “That would be a squandering of money—who person in his right mind would make any such expenditure.” Alternatively, there should be evidence that proper care can be provided in the appropriate environment at a firm figure, less than that sought to be recovered by the plaintiff.

92. In Klar et al, Damages and Remedies in Tort at §58, the authors state:
The application of the principles described above means that the plaintiff is entitled to damages which would provide him with the standard of care that is most conducive to his mental and physical health. For the severely injured plaintiff this means that damages will be assessed according to the cost of providing home care rather than institutional care, notwithstanding that the latter is much cheaper than the former, provided home care serves the best interests of the plaintiff. If, upon a consideration of the plaintiff’s age, mental ability, and psychological make-up, home care is not possible or does not provide optimal care, other forms of care will be considered and damages will be assessed accordingly. Moreover, the award must be reasonable, so that if proper care can be provided in the appropriate environment at less cost, damages will be assessed according to the less expensive alternative. However, the Court is not entitled to speculate as to the feasibility of alternate forms of care when these alternatives have not been introduced in evidence.

93. In Cassels & Adkin-Tetty, *Remedies: The Law of Damages*, 2nd ed. (Irwin Law: 2008) at pgs. 123-24, the authors note that the Supreme Court of Canada has favoured home care for critically injured plaintiffs:

   The primary issue regarding the costs of care is the level or standard of care to which the plaintiff is entitled. In both *Andrews* and *Thornton*, for example, the defendant argued that the plaintiff’s claim to care in his own home (following an accident that rendered him a paraplegic) was too extravagant when compared to the much more moderate costs of institutional care. In both cases the Supreme Court of Canada rejected this argument. The controlling principle for assessing damages for the cost of care is that the plaintiff is entitled to compensation for all of those costs (past and future) so long as they are reasonable… While the claim must be reasonable, and not extravagant, the plaintiff has no duty to mitigate damages in the sense of accepting less than full compensation. For example, in *Olafson*, the Supreme Court again overruled a lower court decision to only award the cost of institutional care to a severely injured plaintiff on the basis that, while the amount was very large from the defendant’s point of view, it was not undue considering the plaintiff’s legitimate needs.

94. In *Andrews* Dickson J. commented on an observation of the Court of Appeal as follows:

   … The phrase "private hospital" is both pejorative and misleading. It suggests an extravagant standard of care. The standard sought by the appellant is simply practical nursing in the home. The amount Andrews is seeking is, without question, very substantial, but essentially it means providing two orderlies and a housekeeper. The amount is large because
the victim is young and because life is long. He has forty-five years ahead. That is a long time.

95. Similarly, in *Watkins v. Olafson* (1989), 61 D.L.R. (4th) 577 at 590-91 (S.C.C.), McLachlin J. restored the trial judge’s award of home care. The Manitoba Court of Appeal had held that a government-subsidized apartment specially equipped for disabled people would provide reasonable accommodation. McLachlin J. commented that “the trial judge’s conclusion on the need for home care was… in conformity with the emphasis on full and adequate compensation for seriously injured plaintiffs expressed by this Court in *Andrews*”, and that “the paramountcy of adequate care for those seriously injured through the fault of others” as affirmed in *Andrews* was the correct approach.

96. Home care has also been favoured in the British Columbia authorities. For example, in *Monych v. Beacon Community Services Society*, 2009 BCSC 562, Gerow J. wrote:

> [85] The defendants argue that Mr. Monych should go into an institutional setting as that would be less expensive than staying in his home and better for him due to his increased care needs. However, they provided no evidence as the cost differential between the cost of institutional care, and the additional hours of home care and the provision of the equipment recommended by Ms. Petra and Dr. Clinton-Baker. Ms. Petra has made a number of recommendations to modify the home to allow Mr. Monych to shower and use the toilet. Mr. Monych has expressed a desire to stay in his home.

> [86] The defendants have not provided any authority for the proposition that a plaintiff should have to move into an institutional setting in order to mitigate his damages for cost of future care. In the circumstances, it is my view, that Mr. Monych’s desire to stay in his own home should be acceded to.

97. In *Dennis v. Gairdner*, 2002 BCSC 1289, the issue was whether damages should be awarded on the basis that the plaintiff acquire a home or whether they should be assessed on the basis that he would reside in a group home. Mr. Dennis expressed a wish to live on his own and said that the institution did not sufficiently address his needs in relation to recreation, leisure, day to day errands or the necessary daily stretching he required.

98. Chamberlist J. was of the view that institutional care "would, … in large measure, fail to compensate Mr. Dennis for his loss". He said at para. 102:
... In the circumstances, I have determined that his desires to have his own dwelling in the greater Vancouver area ought to be acceded to as being reasonable as facilitating not only Mr. Dennis' physical needs but also his mental welfare.

99. In reaching that decision, Mr. Justice Chamberlist said at para. 96:

Just as medical necessity is not the criteria for what future medical care is required, neither should the court look at minimal or lowest standard care that is available. The concept is rather one of adequate or reasonable compensation. In my view, what should be looked at in the case at bar is an award of compensation that will provide Mr. Dennis with a high standard of future care which will give him maximum life expectancy.

100. However, at pg. 124 of *Remedies: The Law of Damage*, the authors also note that:

None of this is to suggest that a court will always defer to the plaintiff’s plan of care. For example, where the plaintiff is severely brain damaged or totally immobile, home care may not be feasible. Other evidence regarding the quality of available care, the self reliance of the plaintiff, or the need for special facilities may also indicate institutional care is the best alternative. Similarly, when presented with two acceptable alternative modes of care, the court may lean towards the less expensive.

101. Institutional care was awarded in favour of home care in the following cases:

(a) *Wipfli v. Britten*, [1984] 5 W.W.R. 385 (B.C.C.A.), where home care was not feasible given the plaintiff’s severe injuries.

(b) *Arce (Guardian ad litem of) v. Simon Fraser Health Region*, 2003 BCSC 998, where after reviewing the evidence and authorities on this point at length (and endorsing *Lusignon*), Sigurdson J. held that home care was not reasonable or medically justified for an 80 year old ventilator-dependent quadriplegic.

(c) *H.C. v. Loo*, 2003 ABQB 52, rev’d on other grounds (2006), 384 A.R. 200 (C.A.), where the Court held that group care was the most appropriate for the plaintiff’s needs. However, to reflect the contingency that her behavioural problems may lead to her expulsion from the institution, she was also awarded the value of 5 years of private home care as a fall back plan.
102. Additionally, the appropriate level of care should also reflect anticipated changes in the plaintiff’s situation and needs, which might point to a different living arrangement in the future. Accordingly, in *Krangle (Guardian ad litem of) v. Brisco*, [2002] 1 S.C.R. 205, although home care was appropriate for the plaintiff while he was a child, it was generally agreed that it would be in his best interest to move to a state-funded group home when he was an adult.

103. Thus, as *Cooper-Stephenson* notes at page 428, even if home care is awarded, “if there is a possibility that institutional care will be needed for a significant period, then the damages should be discounted according to the percentage likelihood of that occurring.” In *Thornton v. Prince George School District No. 57* (1978), 83 D.L.R. (3d) 480 at 488 (S.C.C.), Dickson J. deducted 20% from the award on this account:

> With regard to contingencies, in view of the fact that home care is to be the standard, I think it must be recognized that the duration of such care may be affected by such contingencies as difficulty in staffing a self-contained establishment or the need to enter hospital for special treatment. I think that some contingency allowance is proper and I would be prepared to accept an allowance of 20 per cent.

104. This reasoning was followed in *McErlean v. Sarel* (1987), 42 D.L.R. (4th) 577 (Ont. C.A.), where a reduction in the award was called for to assume for institutional care after a period of 20 years, “by reason of several possibilities, such as the respondent's need for intermittent or permanent hospital care, staffing problems, and the lack of guardian supervision and provision of back-up care by his parents by reason of their incapacity or death.”

105. However, as Lambert J.A. pointed out in *Reekie v. Messervey* (1989), 59 D.L.R. (4th) 481 at 493-494 (B.C.C.A.), even if the plaintiff will frequently be hospitalized, “that would only result in a saving in relation to the items of daily service included in the cost of future care and would not result in any saving in the items relating to the accommodation and equipment”.

The Issue of Fee For Service Care

106. Related to the issue of home vs. private care are emerging questions surrounding the propriety of awarding plaintiffs damages on account of fee for service private health care, where public health care resources are otherwise available.
107. As the availability of private health care expands, we can expect that claims for private medical procedures in tort cases will grow. In two recent cases the Court found private treatments to be reasonable in the circumstances, and awarded damages on this account: *Engqvist v. Doyle*, 2011 BCSC 1585; *Moussa v. Awwad*, 2010 BCSC 512.

108. In *Moussa*, the plaintiff underwent surgery at a private clinic four years after a motor vehicle accident. The defence argued it was an unnecessary expense because the plaintiff could have used the public system. Finding for the plaintiff, Madam Justice Russell stated:

> [266] While the cost of private care will not be an appropriate special cost in every case, given the plaintiff’s emotional uncertainty about surgery and his continuing pain, this is a rare case and I find it reasonable in this case that the plaintiff chose to pursue private surgery with the doctor that he trusted and so that he could have his pain relieved immediately. I therefore award the plaintiff the costs of the surgery.

109. The damages in *Moussa* were special damages as opposed to future care costs. The question of private medical costs as a component of a future care award was squarely addressed in *Engqvist v. Doyle*, 2011 BCSC 1585.

110. In that case, Rogers J. was asked to award the plaintiff money to pay for the private provision of certain injections. The parties differed on whether the plaintiff should receive an award sufficient to pay for the injections and rhizotomies at a private health care clinic, or whether the plaintiff should confine herself to the free-to-her public health care system.

111. The Court emphasized that this issue “does not concern the Canada Health Act. It does not require a philosophical discussion of the pros and cons of a general public health insurance scheme. Neither does the issue raise concerns about “queue jumping” by a well-resourced patient” (at para. 45).

112. The issue was the same as that which arises in every case where the costs of future care are sought: Is a particular future treatment reasonably necessary to promote the plaintiff’s mental and physical health?

113. Rogers J. observed that the evidence established that private fee-for service care was, on the evidence, available more quickly than public care. His Lordship was convinced that the award was an appropriate one to make, for the following reasons:
The question in this case comes down to whether the plaintiff ought to mitigate her cost of future care by confining herself to the public health care system. That question can only be resolved by determining whether it is reasonable for the plaintiff to submit to the wait times and vagaries of the public health care system, thus increasing the length of time before she will know if a rhizotomy will reduce her pain. Private provision of medial blocks will considerably accelerate her coming to know whether a rhizotomy will likely help her.

Reasonable in this context must be measured by an objective standard. What is reasonable in a given case must take into account not only the wait times involved, but also the degree of the plaintiff’s pain while sitting out those wait times and the effect that that pain will have on the plaintiff’s enjoyment of life. A minor ache in one’s little finger would be unlikely to be sufficient to underwrite expensive privately funded health care while a case of surgically curable paraplegia probably would.

Accepting as I do the plaintiff’s evidence concerning the pain she has and its interference with her everyday life, I find that the plaintiff’s pain and its interference with her enjoyment of life is sufficient to merit acceleration of treatment via funding of private health care.

This issue is sure to spawn further litigation in the future, in light of the increasing availability of private health care services in Canada.