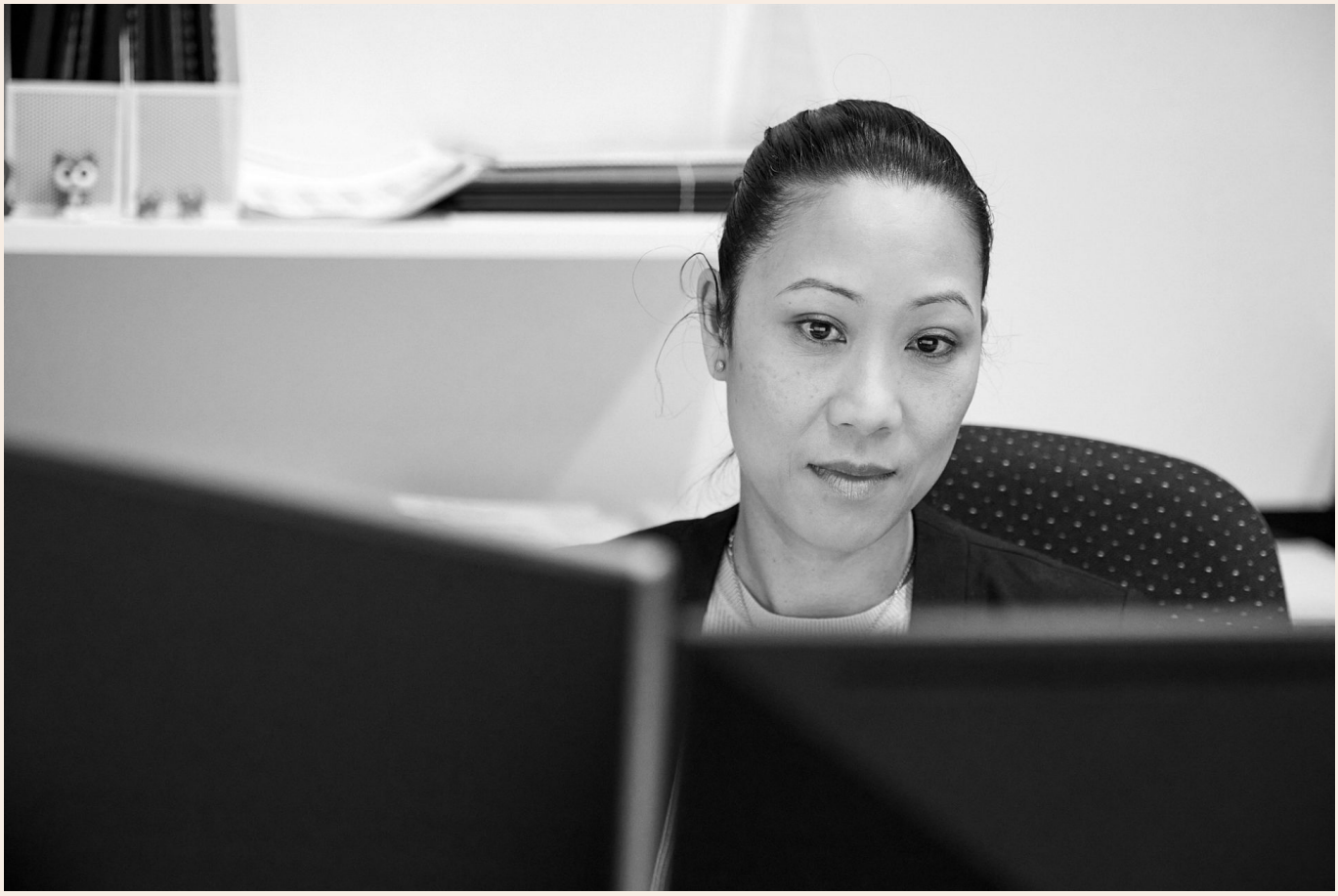


What does a compensation claim for the cost of future care look like?

There are a number of categories of compensation which may be available to an injured person when the injury gives rise to a compensable claim. In legal jargon, these categories are referred to as heads of damage and can include the following, depending on the case:

1. Pain and suffering and loss of enjoyment of life;
2. Past and future medical treatment;
3. Past and future loss of earning capacity; and
4. Past and future care

Over time, governments have legislated and courts have made decisions which have limited how much an injured person can claim for the heads of damage. For example, a claim for pain and suffering and loss of enjoyment of life arising from a personal injury claim is limited by the provisions

of the Civil Liability Act 1936 (SA). As a result, the pain and suffering experienced from an injury, and the loss associated with being unable to enjoy many everyday activities, is poorly compensated. Understandably, this often comes as quite a shock to an injured person, as the physical and mental pain and suffering and the loss of enjoyment from day to day activities is often the most confronting impact for them. Furthermore, if there are no other heads of damage available to an injured person, it's often not cost effective to pursue a compensation claim for pain and suffering only.

The amendments to the Civil Liability Act 1936 which were implemented in 2013 regarding motor vehicle accident claims further restricted the amount an injured person can claim for various heads of damage. The pain and suffering component now has a threshold an injured person must reach, and even if they reach that threshold, the compensation starts at around $3,000.

When a person is catastrophically, seriously or even moderately injured in compensable circumstances, the largest head of damage is often the claim for future care.
This head of damage can range from a modest claim for assistance around the home like gardening, spring cleaning or equipment to assist with activities of daily living, to a substantial claim for personal attendant care and assistance for a person who is unable to care for themselves due to their injuries. The care and assistance required needs to be assessed carefully in each case through expert evidence, including a detailed assessment by an occupational therapist on the day to day needs of the person. The assessment helps to evaluate all care and assistance required for everyday tasks which the injured person previously undertook, and can no longer carry out.

The need for future care and assistance can include:

- personal care (day and overnight)
- domestic assistance
- supervision and support
- case management
- community access
- garden and home maintenance
- additional needs when travelling
- equipment to achieve some independence and improve quality of life including mobility equipment and assistive technology.
- There is also almost always the need for ongoing allied health assistance such as occupational therapy and physiotherapy.

In cases involving catastrophic injury, future care is by far the largest head of damage and disputes arising in relation to this usually centre around the additional cost of accommodating an injured person to live independently in their own home with private carers, home modifications and the like versus a group housing environment where the care costs are shared. The other contentious issues include the hourly rate for care and services and the life expectancy of the injured person.

The age of an injured person at the time of sustaining the injury will impact on the strength of the arguments for and against life expectancy, as well as the seriousness of the injury sustained. Compensation for future care is limited to care required as a result of the compensable injuries, and not care that would otherwise have been required by the injured person in any event. For an older injured person there may be many aspects of care that would have been required in any event due to

the person's age despite their injury, for example heavier household and gardening tasks, home maintenance and spring cleaning tasks. Consideration of the claim will involve an assessment of the injured person's level of independence before sustaining the injury and also the normal risks of life and the likelihood a person might have required assistance in the future despite the injuries sustained.

At the opposite end of the spectrum of age is a claim involving a baby or young child. Similarly, a claim cannot be made for care that would usually be required for a baby or young child in any event. A claim is limited to the additional care the baby or child will require as a result of the injuries sustained.

The New South Wales case of Tu Tran v Dos Santos [2008] NSWSC 1216 (20 November 2008) is an example of the court considering life expectancy and accommodation factors in calculating compensation for future needs. Mr Tran was involved in a serious car accident at the age of 38, which caused him extensive brain damage and left him spending the rest of his life in a bed and unable to speak. His life expectancy was approximately 9 – 11 years. Compensation awarded for his future care was made up of annual hospital fees plus additional costs of one on one care required, but only for the 9-11 years that Mr Tran was expected to live. This compensation was calculated to be $2,182,279.

There is also often a dispute over the hourly rate to be assigned to the future care and assistance required particularly when some of the care is likely to continue to be provided by family members as opposed to commercial carers. Similarly, disputes may arise where a claimant could live either in hospital, or at home, but the costs of providing in-home care would far outweigh the costs of hospitalisation.

These issues were considered by the High Court in the case of Sharman v Evans (1977) 138 CLR 563. Ms Evans, a 20 year old woman, was injured in a car accident and became quadriplegic. She required care for the rest of her life, which was expected to be around twenty to thirty years. Ms Evans' life expectancy, and the kind of accommodation she would require, were considered carefully by the court in determining her compensation for future care. The court noted that Ms Evans could be cared for either in hospital or in her own home, but that care in her own home would be far more expensive, for example modifications required and the cost of full time professional nursing.

The court determined that it was not reasonable to compensate Ms Evans for future care at home, when there was no medical benefit that required her to be at home rather than in hospital. As such, the court calculated the compensation for medical care by multiplying annual hospital fees by the number of years Ms Evans was expected to live.

Each case will be dependent and determined on the particular circumstances of each case and what is reasonable in the circumstances.

If you would like to find out more information about compensation for future care, or any other area of the law, please contact the Personal Injury Law team at Andersons Solicitors at Andersons.com.au

> When a person is catastrophically, seriously or even moderately injured in compensable circumstances, the largest claim is often for future care.

The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances

can change. For advice specific to your situation, please seek professional legal advice.