

Costs of Care in Personal Injury Claims: Best Practice Guidance

Introduction

1. Damages for the costs of care of seriously injured claimants are frequently the largest element of their claim.
2. The claims for the cost of both past care, often unpaid care by members of the family, and for future care, to be provided by professional carers and by the family, in the damages award, are frequently contested, sometimes through to trial, especially in claims for serious injuries to children who will require care for the rest of their lives.
3. Evidence on the need for, and costs of, care in larger claims is usually provided by:
 - a) medical evidence on the claimant's needs;
 - b) assessments and records from local authorities and/or primary care trusts;
 - c) witness evidence from the claimant and/or the family, possibly supplemented by diary or video evidence; and
 - d) evidence from one or more care experts.
4. Care experts may be from nursing, occupational therapy or case management backgrounds. There will often be additional evidence to the written care reports in the form of CPR 35.6/7 questions and answers, a CPR 35.12 joint statement (following an experts' discussion where permission has been given for each party to instruct their own expert), and oral evidence at trial.

- 5 Care evidence is essential especially in serious injury claims but can be expensive to collect and may be the subject of dispute because:
- a) the family carers have, understandably, not kept records of the past help and care they have provided;
 - b) defendants may not accept that some or all past family help amounts to care for which damages should be awarded;
 - c) an appropriate rate for past family care cannot be agreed, including whether any, or what, deductions should be made from commercial rates of care because the family carer was not paid, and therefore did not pay tax or national insurance, and whether or not enhancements for working unsocial hours should be applied and if so how these should be applied;
 - d) there is no agreed “baseline” for any help or care the claimant received before the injury was sustained or where the injury was sustained at birth what the care needs would have been for the uninjured child, leaving the experts to assess that for themselves, which may or may not be explicit in their reports;
 - e) the care experts may have received different instructions and varying information (in terms of other experts’ reports, witness statements and records) and/or seen the claimant and their family at different times and therefore assessed the needs differently. Again these differences in instructions or assumptions may or may not be explicit in their reports;
 - f) there are no agreed national or regional hourly or daily rates for paid care, accordingly experts use different scales from different sources, and combine the various scale rates for daytime and “unsocial hours” care (evenings and weekends) in different ways;

- g) there is no standard format for instructions to care experts - and the quality of instructions and the information provided varies greatly; and
 - h) there is enormous variety too in the length, content and detail of care reports.
- 6 As a result parties, their lawyers and the trial judge will sometimes be presented with reports that cannot be compared easily, even after CPR 35.6 questions have been answered. Also care experts, when they meet, can sometimes find it difficult to produce a statement of areas of agreement and disagreement when the starting points for their reports were different. In addition, this can make it more difficult for agreement to be reached on claims for care when round table conferences or mediation are attempted. Should the claim be contested to trial, it is desirable for the evidence and points in issue to be clearly expressed so that unnecessary time is not spent on oral evidence and cross-examination.

The aim of this Guidance

- 8 The aim of this guidance is to assist in the preparation and presentation of claims for the past and future care of the injured claimant in personal injury and clinical negligence claims.
- 9 The Guidance is intended to:
- a) encourage the provision of more information on the claimant's likely care needs to both parties at an earlier stage than is commonly the case;
 - b) encourage solicitors to use similar instruction letters to care reports;
 - c) recommend a template for a standard format for care reports; and
 - d) give particular guidance on the preparation of claims for past care.

The Guidance documents

10 Attached are the following documents recommended for regular use in compiling claims for care:

1. A schedule of information about the claimant and their current care, to be completed after proceedings have been issued, and sent to the defendant's solicitors and the Court typically before the first case management conference in multi-track claims. The Schedule can be completed by the solicitor or the claimant or their family, as necessary. This is intended to be a factual document but not one to be produced in evidence – hence it does not include a statement of truth and no sanctions can be applied if it is not completed in full.
2. Blank specimen care diaries which the claimant's family are encouraged to complete in high value cases for at least short periods, to provide a snapshot of the claimant's care needs for the care experts, lawyers and the court.
3. A draft letter of instruction to a care expert.
4. A template for a care expert's report.

Guidance on claims for past care and domestic help provided by the family

11 Estimating the hours and value of past care by the claimant's family can be complex and time consuming. Sometimes in lower value (especially in the fast track) claims the cost of assessment may be disproportionate to the value of the claim, especially if this work is done by a care expert. Yet in larger claims, awards for past care are relatively low in value in comparison with the totality of the damages, and are rarely contested to trial.

- 12 A significant problem is that there is no standard hourly rate for paid care that parties should use as a guideline. At present some solicitors and care experts choose the local government National Joint Council rates: but others may choose rates from commercial agencies local to the claimant. Many claimant solicitors do not explain the basis for the hourly rate chosen in the Schedule of Loss. Challenges to the claimant's rates by the defendant's insurers are common even in low value claims. But judges are rarely provided with any evidence on which to decide the appropriate rate.
- 13 This Guidance recommends that:
- a) Care claimed should be as a result of the disability sustained in the accident, and should be care beyond the usual sharing of household duties;
 - b) Regard should be had to current case law relating to contributions to or payment of the costs of care, therapies, equipment etc by Local Authorities and Primary Care Trusts particularly in case of partial recovery;
 - c) The Local Government Association National Joint Council rates should be used as the starting point. These are readily available (from the National Joint Council for Local Government Services 1 Mableden Place, London WC1H 9AJ 0207 296 6600) and are revised annually;
 - d) Any enhancement or variation from the NJC spinal point home help rates, whether for type or hours of care, or because of where the claimant lives or because of their particular needs must be explained in the care report and/or Schedule of Loss and be supported by evidence;
 - e) Care and help by family members should generally be treated as equivalent to that provided by the local government home help services on the NJC scales spinal point 8. The home help job

description mirrors the role of most family carers (domestic duties e.g. cleaning, cooking and washing; physical tasks e.g. dressing, washing and feeding; and social duties e.g. shopping, conversation, paperwork and recreation);

- f) Rate changes over time should follow the changes in the published NJC rates; and
- g) A deduction will usually be made from the NJC rate to reflect the fact the family carer has not, in fact, been paid, and has not, therefore, paid tax or national insurance or incurred other expenses e.g. costs of travel (see *Housecroft v Burnett* 1986 1 AER 322 CA and *Evans v Pontypridd Roofing* 2001 IRLR 659). The amount of the deduction will depend upon the hourly rate used, the quality and amount of care provided, the age of the claimant, and the nature of the disabilities. Deductions are frequently for 25% but may be less, or even nil if particularly high quality care has been provided, and occasionally may be higher - up to 33%. The claimant should propose and justify a deduction in the care report or Schedule of Loss. The defendant should justify any alternative in the Counter-Schedule.

- 14 It should be noted that awards for family care and domestic help are not limited to serious cases and may be made for small amounts of assistance or extra care of children see for instance *Giambrone v Sunworld Holidays Ltd* 2004 EWCA Civ 158 and *A v the Archbishop of Birmingham* 2005 EWHC 1361(QB).

Care claims for children

- 15 Care experts experience an additional problem when the claimant is a child - what to assume is the “normal” care needs of an uninjured child of that age in that family, to form the base for the estimation of care required resulting from the accident/injury.

- 16 Care experts should make explicit in their reports the baseline they have adopted for the “normal” care needs of this particular child at different and specified ages.
- 17 Differences between the baselines can then be the subject of CPR 35.6 written questions and an agenda item for CPR 35 12 discussions.