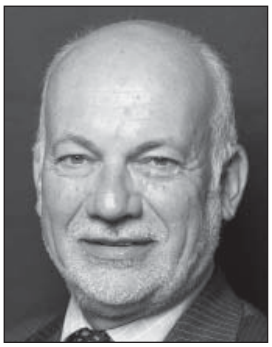
Maximising damages in brain injury cases

Nigel Cooksley QC and Rosalie Snocken identify the problem areas and advise against settling too early



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'If funds can be made available then do not "make do". Even if there is a compromise on liability due to litigation risk or contributory negligence, obtain an interim payment, engage a case manager and put into effect the care package.'

This article considers how those representing claimants in serious brain injury cases can maximise the damages to be received by their client, focusing upon the gathering of evidence ready for preparation of the schedule.

First offer

The first tip is not to be too tempted with an early (and particularly the first) offer. Unless it is manifestly over the top it is very rarely going to be of advantage to the claimant. This is particularly the case where it is not yet known as to how the brain injury may settle and what the future prognosis is. Claims generally tend to increase in value as they proceed and settling too early could risk a subsequent professional negligence action.

Past losses

Past loss of earnings

This is unlikely to be a particular problem if the claimant is a young child (as it is unlikely that they would have been working anyway) or for an adult who was in regular employment in which case it is likely to be relatively straightforward to calculate what the earnings would have been based on the period leading up to the injury. However, in the latter situation be careful to consider whether the claimant's earnings would have increased for any reason, for example if they might have achieved a promotion and be sure to obtain clear evidence supporting such a proposition if running such an argument.

The situation becomes more complex where the claimant was self-employed before the accident. Much will depend upon the nature of the records the claimant kept before the accident and the extent to which earnings were declared. Accounts and tax records should be carefully analysed. Furthermore, careful consideration should be given where the claimant's self-employment was relatively new and it can be shown that the previous years' earnings show a clear upward trend which would have continued but for the accident. Think about the nature of the claimant's self-employment and whether there were any reasons why the claimant may have earned more going forward than they had before the accident. In such situations it may be necessary to obtain witness evidence concerning the particular sector that the claimant was involved in.

If the claimant is a young adult or teenager, care must be taken not to ignore the question of past loss of earnings even if the claimant was not earning at the time of injury. This will often be tied into considerations of future earnings and what the claimant's likely career path would have been: obviously if it is to be argued that the claimant was likely to continue in education on to university their past losses are likely to be less than if it is clear that the claimant probably would have left school at the age of 16. However, even in the former case be careful not to forget about whether the claimant would have held a holiday job or a

part-time job while at university (especially with the increasing trend for university students to work while studying).

Past care

If funds can be made available then do not 'make do'. Even if there is a compromise on liability due to litigation risk or contributory negligence, obtain an interim payment, engage a case manager and put into effect the care package which it is contended that the claimant needs. Demonstrate to the defendant insurers and/or the court that this is what is needed and the money will be spent in that way in the future. It will also significantly help in cases where there may be a question mark as to whether the proposed care package can work in reality: what better evidence on this point than to show it has actually worked and been successfully implemented for x months/years? Courts are unlikely to find that a care package put into effect on professional advice was unreasonable such that the claim for past care is discounted.

It is often the case, particularly with younger claimants, that the family are resistant to external care being brought in as many find it intrusive. It is worth addressing this as early as possible so that the care package can be well-established by the time of trial as discussed above. However, even if earlier on you have not been successful in persuading the family to put extra care in, make sure that you regularly return to the issue as attitudes often change as reality hits in and the family becomes increasingly tired, frustrated and overstretched. Remind the family that parents cannot cover the care forever and brothers or sisters will develop lives of their own. Also, point out the significant benefits that carers can provide: not only will they relieve the burden on family members but they should also provide stimulation, companionship and security for the claimant. This will allow family members to go back to being mum/dad/sister/brother rather than carers. Of course the ability to do this will largely depend on the nature of the care package being recommended: the case manager and care expert will guide you on this but if the family are reluctant, a care package involving directly-employed carers supplemented with agency care to cover when required, rather than just relying solely on agency care, can help to try to establish continuity and trust between the family and the small number of carers specifically employed to work with the claimant. Agency carers tend to be more expensive than directly employed carers but a court will not criticise the use of them prior to the case being resolved and the claimant knowing where they stand.

It is often the case, particularly with younger claimants, that the family are resistant to external care being brought in as many find it intrusive. It is worth addressing this as early as possible.

Although a care expert will assist with calculating past gratuitous care you will need to gather the witness evidence to support the care expert's figures. It can often be difficult to think back over many years if this is left until late in the process. It can therefore be helpful to keep a careful note/record of what care the family members are giving each time there is a meeting with the family to make it easier to record what care was being given during different periods when the final witness statements are produced some years later.

It is also important with gratuitous care to think not only of the number of hours each week that were being provided, but the time of day or week that such care was performed or the nature of such care. Does the care involve a substantial number of anti-social hours ie nights and weekends? Was the care particularly demanding? If so, obtain detailed witness evidence (and appropriate expert evidence) about this so as to support a claim for the aggregate/enhanced rate to be applied rather than the basic rate: see *Massey v Tameside and Glossop Acute Services NHS Trust* [2007].

Past accommodation

As with care, it is usually advantageous if the move to suitable alternative accommodation has already happened by the time of trial rather than just being an anticipated/predicted move. It is much more difficult for the defendant to challenge the reasonableness of the move it if has in fact been done. It is also likely to make a significant difference to the claimant and the family, particularly if the claimant's mobility has been affected by their injuries. Even if there is 'over provision' and a discount has to made, most families' priority is to move to a suitable property and overall there is still likely to be more awarded, even after the over-provision discount has been made, than if it is based on anticipated costs of finding a suitable house.

It is often underestimated how hard it can be to find suitable accommodation, particularly for claimants in wheelchairs or with limited mobility. If the claimant lives in an area where bungalows/suitable single level accommodation are hard to find, while being careful not to overburden the family/litigation friend, it is often helpful to ask them to keep detailed records of the searches for accommodation they have been carrying out to highlight the lack of suitable properties (and to make sure they are carrying out regular searches). This will help to show why a property that may on first impressions look over-the-top is in fact reasonable because there was nothing else available. Of course care should be taken to make sure it is not extremely unreasonable: the nine-bedroom hotel in the case of *Eeles v Cobham Hire Services Limited* [2009] was never going to be persuasive for the judge!

In a case where the claimant will be living alone, apart from his carer(s), a rented flat may be needed to set up the care package if a property cannot be purchased.

The rent can either be claimed in full (eg if the claimant would otherwise have lived with his parents) or the difference claimed between what he was paying in rent and what he now needs to pay.

there are any adaptations required and do not forget additional costs such as insurance for young carers or the increased cost of tax for a large SUV compared to the car the claimant was likely to have had. Your case

Think carefully about future promotion or enhanced earnings prospects. Try to obtain as much evidence to support this as possible and to support realistic splits in the multiplier based upon when such raises were likely to occur.

When considering accommodation costs (either for the past, future or for the purposes of obtaining an interim payment) do not forget the additional expenses including removal, adaptation costs and equipment/furniture costs.

Past travel

Consider carefully the type of vehicle that is needed, whether manager or OT will be able to advise on the appropriate vehicle and the best way to purchase it eg by the motability scheme.

Remember to claim for the additional trips made for example for hospital visits, treatment, therapy etc that would not have been made but for the injuries and thus arguably recoverable in full, as well as additional costs per mile for other mileage if the vehicle's costs are greater than the one which the claimant would have had.

Future losses

Future loss of earnings

As briefly mentioned above in relation to past losses, the claimant's likely career/employment path but for the accident needs to be carefully considered and supported with evidence. Look at what the claimant's family have done: both parents and siblings. If the claimant was too young to be working then consider any expressions of interest in a particular job or career and if possible obtain school records or witness statements of previous teachers to support this. In the recent case of *Jubair Ali v David Graham & anor* [2013] , it was helpful that despite being a low achiever academically, the claimant had before the accident expressed a consistent (realistic) desire to be a policeman (supported by school/college records and evidence from his pre-accident teachers) and thus the judge was persuaded to base loss of earnings at least in part on the higher earnings of a career in the police force (see in particular paras 14-15, 232-234 and 328).

As with past losses, think carefully about future promotion or enhanced earnings prospects. Try to obtain as much evidence to support this as possible and to support realistic splits in the multiplier based upon when such raises were likely to occur. For graduates, consider evidence to support a split in the multiplier at appropriate points rather than simply taking average graduate earnings (even if that is an average in a particular sector/type of graduate employment).

Much depends on the type of employment, but generally remember that people in work now are expected to work until a later age than historically may have been the case and for many types of employment it will be appropriate to use a retirement age of 68-70 rather than 60-65.

Where residual earnings capacity is in issue Ogden 6/7 should do away with the need for an old style Smith v Manchester award (although note that the 'Blamire approach' was adopted

in the non-brain-injury case of *Ward v Allies & Morrison Architects* [2012]). The courts have so far shown an inclination to 'modify' the Ogden 6/7 multiplier where there is residual earnings capacity and the disability is not regarded as severe as many disabilities: see for example *Conner v Bradman* [2007] . Therefore consideration may need to be given to obtaining evidence to support any argument against that. However, this can work in the other direction. The writer recently had a total blindness case where the defendant accepted that the Ogden 7 multiplier was too high given the level of disability.

Also do not forget about a lost years claim in the case of an adult claimant with a significantly reduced life expectancy.

Future care and case management

Much of the focus on evidence is likely to be on this as it is so often by far the biggest head of claim in serious brain injury cases. Therefore, choosing the right expert is vitally important: if an inadequate care package is recommended, it could cost the claimant a seven-figure sum (not to mention the lower quality of life the claimant will be faced with) but equally it is important to bear in mind that an unrealistic, over-the-top recommendation will destroy the expert's credibility so is likely to result at trial in a drastically reduced figure if the defendant's expert is preferred.

There needs to be very careful thought given to why home care is appropriate rather than residential, why private funding rather than state, what the state position would be anyway, and such questions are likely to be particularly influenced by any split in liability.

As discussed in relation to past care, get the family on board! Make them realise the long-term consequences for the claimant if they stand in the way of an appropriate care package and how there is no coming back to court if circumstances change in the future such that they are unable to provide the care that they were hoping to provide.

Future aids and equipment

Do not underestimate the costs involved which can be very substantial. Get a full report on the costs to be incurred at various stages of the claimant's life (and tie in with any anticipated changes in the claimant's condition based on other experts' opinions). Sometimes this may be included in the care report but often it is preferable to deal with it by way of a separate report from an occupational therapist.

A severely injured claimant may require specialist IT equipment for communication, leisure or to counter physical disability. As well as initial outlay, very often there are significant maintenance and replacement and costs involved due to the relatively short life of electronic/IT products. Consider whether a specialist report (on top of the general aids and equipment one) is needed, including to be able to comment on any potential future developments.

Future therapies

Consider what therapies are needed. It is not just about present need: how are the claimant's needs going to change over time? Physiotherapy needs for example can often increase as the claimant gets older. Will the claimant require occupational therapy, speech and language therapy, physiotherapy, neuropsychological input? It is likely that expert evidence will be required to support a claim for costs in each of the different areas of therapy.

Future medical expenses

Do not forget that the claimant may need future medical treatment over the course of their life and obtain details and costs from the medical experts.

Future accommodation

If a move is likely to be needed in the future, then similar considerations to those discussed in the past accommodation section above arise, including the additional expenses. The claim will of course be based on a Roberts v Johnstone calculation so focus upon evidence to support each of the different elements that input into that calculation.

In appropriate cases consideration should also be given to future DIY and/or decorating costs, so ensure this is covered if necessary in either the care or aids and equipment report.

A party may state in their statement of case whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages.

Future Court of Protection

If capacity is lacking, as is so often the case in brain injury cases, this is another area in which to be careful of not underestimating the costs involved. If your firm does not have a specialist department engage a firm that does to calculate these costs. In any event, a full witness statement to deal with how the costs are calculated will be required. If such evidence is obtained, it can be very difficult for the defendant to contest these costs.

Interim payments

As noted above, it is important to obtain interim payments to fund the purchase of appropriate accommodation and the recommended care package. However, following the case of *Eeles* that is much more difficult than it used to be and courts will be wary of fettering the ability to award periodical payments at the final hearing. Therefore, a court may require some significant persuading to award by way of interim payment a sufficient amount of money. A comprehensive and well-reasoned application will be necessary with clear evidence to support both the suggested figures for a final award (which should be on a demonstrably conservative basis) and, if damages for heads of claim other than past losses, PSLA and accommodation are to be

used, the need for the interim payment. Generally, the court is much more likely to be sympathetic to giving the interim payment requested if they can see the clear benefit/difference this will make to the claimant.

Furthermore, do not think that evidence has to be restricted to words on the page. We have had experience in particular of a case in which the defendant was arguing that the claimant being cared for in their own house in the community was inappropriate due to the minimal levels of awareness which the defendant asserted the claimant had following his very severe brain injury. It was said that it was not reasonable for there to be a privately-funded care package at home given how little difference it would make to the claimant. One of the main pieces of evidence that helped change the defendant's stance on this issue was video evidence, taken in a wide range of situations by the claimant's support workers (his care was already being supplemented by additional privately-funded support workers to increase his access to the community). This was extremely powerful evidence in showing, through non-verbal signs, how the claimant did react to different surroundings, meeting different people and even on one occasion managing to catch a ball, and clearly demonstrated the error of the defendant's argument that this was someone who was very minimally aware.

Life expectancy

There is an increasing trend for defendants to instruct a 'life expectancy' expert over and above the medical expert. These 'experts' use statistical data to calculate the claimant's life expectancy taking into account not only their injury but their pre-existing conditions and lifestyle (ignoring the fact that the Ogden Tables take most of these factors into account anyway) and often come up with life expectancies way below those provided by the medical experts. Do not agree to a joint report. Be prepared to get your own expert to counter this sort of evidence (if you cannot prevent permission being granted in the first place). This may be from a medical expert or an actuary.

Nature of the award – lump sum or periodical payments?

Be aware that this issue should not just be considered at the end of the process once the final schedule has been produced. For example, CPR Rule 41.5(1) indicates that a party may state in their statement of case whether it considers periodical payments or a lump sum is the more appropriate form for all or part of an award of damages and where such statement is given must provide relevant particulars of the circumstances which are relied upon, but under subsection 2 if such a statement is not provided the court may order it.

Thus, although the financial expert will guide you particularly towards the end of the process, you need to consider the alternative methods of settlement/award long before the expert is instructed. In general, since *Tameside and Glossop Acute Services NHS Trust v Thompstone* [2008], and in the absence of any indication that the 2.5% discount rate is to be altered, in a 100% liability case, periodical payments for care and case management are likely to be appropriate, particularly where the care needs are fairly consistent and predictable or life expectancy is an issue. However, each case specifically has to be carefully considered. Cases involving split liability are more problematic though still suitable for periodical payments, but also there may be difficulties where the contingency lump sum provided by other heads of claim is low, for example where interim payments have been provided and much of the money from these heads has been spent on care and/or accommodation or where loss of earnings is very low. Consideration should also be given to whether the nature and extent of the defendant's insurance is relevant to this question and thus whether any questions need to be asked or disclosure needs to be obtained from the defendant in this regard.

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Provisional damages

In nearly all head injury cases of any severity, provisional damages should be pleaded to reflect the risk of epilepsy. But the question remains whether the case should be settled on a final basis or to insist on provisional damages if epilepsy has not developed? Evidence will need to be gathered as to the likely effect on the claimant if he develops epilepsy in the future. Consider for example whether the claimant is currently still able to work or drive and therefore the risk that they will lose this due to epilepsy in the future. Would epilepsy have a future devastating effect on the claimant's life or in terms of future damages might it not be worth a great deal?

Conclusion

Although general guidance can be given as we have attempted to do above, it also goes without saying that careful thought needs to be given to the particular circumstances of each individual case. Finally, remember to prepare each case as if it were going to trial, and thus that a judge needs to be persuaded with compelling evidence, even though most cases do not get that far. ■

Conner v Bradman
[2007] EWHC 2789 (QB)

Eeles v Cobham Hire Services Limited
[2009] EWCA Civ 204

Jubair Ali (A Protected Party by Jabid Ali, His Father and Litigation Friend) v (1) Mr David Graham (2) Motor Insurers Bureau
[2013] EWHC 1730 (QB)

Massey v Tameside and Glossop Acute Services NHS Trust
[2007] EWHC 317 (QB)

Tameside and Glossop Acute Services NHS Trust v Thompstone
[2008] EWCA Civ 5

Ward v Allies & Morrison Architects
[2012] EWCA Civ 1287