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## One claimant – Two opposing views about the cost of care

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### Introduction

It is over four years now since the Civil Justice Reforms and it is evident that the conclusions arrived at by opposing experts about the past and future care needs of claimants are as wide apart as ever. How can it be that two professionals, from the same or similar disciplines can come to such different conclusions when they have both affirmed that their duty is to the court and that the facts in their reports are true and the opinions correct?

Experts' discussions are now commonplace so there is a formal setting to identify the reasons for disparity. I have trawled through over a hundred joint statements, prepared by my organisation, setting out areas of agreement and disagreement and summarising reasons for disagreement. Incidentally 68 per cent of these instructions were from claimant lawyers and 32 per cent from defendants. My researches have confirmed that the reasons for the polarised views have not changed since I started preparing experts' reports nearly 20 years ago and that the Woolf changes have made little or no impacts on the underlying reasons for the contradictory conclusions.

### Valuing gratuitous care

In the majority of the statements I have read both sides' experts have valued past gratuitous care at the hourly rate paid to home carers. It should be noted that there is no longer a nationally agreed pay rate or job description for home carers. The National Joint Council for Local Government Services (formerly the NJCLA) now publishes a spinal column of hourly pay rates. Local authority employers are supposed to choose the appropriate point on a spinal column to remunerate home carers in their district. Our researches show that nearly all local authorities continue to set their home carers pay at Spinal Column 8. This is the hourly rate that is nearest to the old standard nationally agreed rate. The rates paid from local authority to local authority still do not vary markedly. Most care experts continue to use spinal column point 8 to value gratuitous care. Some use a rate paid to Crossroads carers (these were originally based on NJCLGS rates) and there are few examples of experts using pay rates "based on experience"

rather than a published scale. Some experts enhance the hourly rates for weekend and unsocial hours. It would be helpful if solicitors would indicate from the outset when they want the expert to quote enhanced rates.

I would also welcome any movement towards finding an agreed rate for valuing gratuitous care. The current system, which encourages the experts to spend time discussing hourly rates that are pence apart, is time wasting and demoralising for experts, who can only agree to disagree. There are always going to be exceptions to the rule. For example, I believe this hourly rate would be too low for a mother who is a trained nurse and is therefore able to perform procedures that the most loving and attentive family members could not attempt.

I do not believe that it is the experts' job to get involved in discussions about how much the hourly rate for gratuitous care should be discounted, but I do know that lawyers should be very careful to understand the rates that they are discounting. I realise that the discount is made to the commercial rate to reflect the fact that had the carer been an employee (s)he would have had to have paid tax (22 per cent on income over and above a personal allowance of £4,615.00) and national insurance (12.8 per cent on income above £4,628.00) on his or her income. I cannot, however, understand the argument for discounting as much as 33 per cent. These deductions from an employee's salary would be offset by the benefits associated with employment. Social services or Crossroads home carers would have two days off per week, have pension rights, receive four weeks holiday plus public holidays, enhanced rates for unsocial hours (if the unsocial hours were outside those indicated in their contract of employment), enhanced rates if they worked in the London area, paid sick leave (one month's full pay the two month's half pay), maternity leave (six weeks' pay, minimum of nine or ten weeks off work), maternity support leave (five days "paternity leave"), adoption leave, plus paid time off for acting as a juror, medical screening and territorial army training!

### Problems with assessing future care need

The gulf between opposing experts' views on future care is far greater than past care. The superficial and obvious

reason for the disparity is a mismatch of opinion about the number of hours of care needed and the hourly rate of pay for the job. My organisation has spent much, money and energy searching for standardised tests or professional practice models that could enhance the accuracy of our reports, but we have not found a test that is universally helpful. The tests available measure the functional status in a range of everyday activities. That is the degree of difficulty encountered by the individual when attempting a range of tasks. Most of these tests will highlight if assistance is needed to perform the function tested. Many of the most sensitive tests are designed to compare performance pre and post surgery or to measure the outcome of a course of treatment. There is no standardised test that converts the score for loss of function or independence into units of time, let alone units of cost. The hours assessed will be a subjective judgement based on the experience of the assessor. Two experts are rarely going to come to exactly the same conclusion as care assessment is not an exact science. Unfortunately the amount of hours and the hourly rate of pay can seem very similar to the expert but very different to the solicitors when multipliers have been calculated. What is going wrong when the differences seem enormous even to the expert?

All care experts should go through two distinct stages of decision making when assessing the number of hours of care, which will be needed when funds are available to pay for that care. The first is a task analysis of care duties. The second is to consider how these tasks could be fitted into an achievable care package. It would appear from the joint statements I have read that not all experts take the second step into account. Failing to consider the second step could have a considerable financial repercussion if, for example, the care expert assesses that the claimant needs half an hour's assistance several times throughout the day and night. In the real world you would not be able to recruit care assistant(s) to travel to an individual's house to work for half an hour at a standard rate of pay in the daytime, let alone at night. The care expert would have to modify the care package or enhance the rate of pay very significantly.

### Pre-existing conditions

In our organisation we assume that our role is to assess care needs which are *over and above those which exist at the time of the accident*. If solicitors instruct inexperienced experts they should tell them that this is the starting point of the assessment. I can see there has been confusion created by a lack of clear instructions about how to tackle pre-existing problems in a few of the statements I have read through. Even experienced experts need to be informed about the parameters of the assessment if there is an element of doubt about how they should tackle the assessment. For example, if the claimant suffered from a serious medical condition pre-accident and there is disagreement about the extent to which the injuries sustained have exacerbated the problem. The instructing solicitor could instruct the expert to describe and cost all the care needed so that the medics can discuss what percentage of the care is attributable to the accident.

The other obvious divergent figure is the hourly rate paid to carers. In the statements I have looked through, these range from less than the minimum wage of £4.20, up to £15.00 per hour. Incidentally both sides' experts agreed that £15.00 was an acceptable pay rate because of the exceptional circumstances of the case. The figures I have

just quoted are hourly rates paid to the carer – they do not include agency fees, the cost of recruitment and training, the incidental costs of having an employee in the home or, in many cases, the cost of employing a case manager to recruit the carer. The experts will or should consider the arduousness of the role, the geographical location of the claimant's home and other market forces when coming to conclusions about the hourly rate. The hourly rates of pay given by the experts will not necessarily be exactly the same but they should be similar. If they are not, the reasons for the differences should be explored further.

### Different instructions

Occasionally the opposing experts' pictures of the claimant appear to have been so different that it would seem that different claimants had been assessed. Occasionally this was because of the long interval between the two experts' assessment visits. Claimants had improved markedly after a very slow start, or conversely deteriorated physically and psychologically when the truth had come home to them that their disabilities were going to be permanent.

A more sinister version of the "one claimant, two viewpoints" scenario is fairly common with individuals with acquired brain injury, especially subtly head injured claimants. The statements I have read indicate that the experts, who fail to recognise subtle but often catastrophic repercussions of head injury, do not come from the professional background with "hands on" experience of working with head injured clients on a day-to-day basis.

The gulf between the experts' recommendations can also be due to a genuine difference of opinions as to the authenticity of the claimant's complaints. One of the two experts may form an opinion that the claimant is malingering. An expert's suspicion can be raised in documentation provided by the solicitor or at the assessment interview when the expert is made wary by something he observes or hears. The expert cannot help but modify the approach to the assessment once he has become sceptical. But (s)he should tell the instructing solicitor promptly of the reason for the intended approach in the report.

Another reason why schedules can be so far apart is that some experts work to broader remits than others. As well as valuing past and future care they might include the likely cost of case management, a commentary on the suitability of expenditure on specialist equipment purchased to date, the cost of future specialist equipment (as things may change as the claimant gets older or his health deteriorates), extra transport costs, extra miscellaneous costs (for example, the cost of a special diet), extra heating costs, the need for therapy and comments on the housing needs of the claimant (which highlights costs, especially when the cost of a full architect's or surveyor's report would not be proportionate). The care expert might also highlight extra future costs associated with employment. Clearly the more areas that the care expert explores, the more costs he might uncover. If I were a claimant solicitor I might write a very long list of possible topics that I would like my care expert to explore. If I were a defence solicitor I would probably give a narrower remit. As an expert I would welcome advice from our instructing solicitors about what we should do in experts' discussions when there is a mismatch of report content. Do we discuss the matters that are not mentioned in our opponent's report or not?

## Benchmarks – a task for the lawyer?

I have left what I observe to be the most important factor creating the largest difference between the costings until last. This is that different organisations and individuals work to different benchmarks. In *Lim Poh Choo v Camdem and Islington Area Health Authority* (1980) AC 174 (Lord Scarman) the House of Lords re-affirmed what Lord Blackburn said a hundred years ago: “the principle of the law is that compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong”. Since starting this work I have always understood that we should be working to the “Lim Poh Choo” benchmark.

Many experts, especially those favoured by defendant solicitors, work to a benchmark which is closer to *supplying care which will ensure the safety of the claimant or assessing the minimum costs of goods and services that would enable the claimant to survive in the community*. At the other extreme some experts choose to work to a benchmark which cocoons the claimant in a care package which eliminates *all* the risks associated with everyday living to which non-injured citizens are exposed every day.

Over the years I have been involved with about 10,000 cases. I cannot remember receiving a letter of instruction giving guidelines about the “yardstick” that we were supposed to work to. Now “the expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written”. A copy of the letter of instruction is often appended to an expert’s report. Post-Woolf we no longer receive defendant instructions urging us to minimise our recommendations – our instructions are now blander and generally less directive and less honest. Defendant lawyers will often be attracted to experts whose benchmarks do not address “quality of life” issues. Claimant lawyers will lean towards using experts who explore every avenue where cost might be incurred and attempt to remedy all the difficulties they find. Covert rather than overt means seem to be being used to achieve the lawyer’s goals.

I believe it is unwise of lawyers to expect care experts to set their own benchmarks. The practice might be reasonably harmless when there is one expert working for each side. The experts meet to draw-up a joint statement that identifies areas of agreement and disagreement. The mismatch of approach is thus identified. The side with the more persuasive argument presumably wins.

The potential injustice comes when there is a single joint expert. It is my company’s experience that although “each instructing party may give instructions to the experts”, we usually receive one instruction letter that has been jointly agreed by both sides. I have never seen a joint instruction letter that gives us directions about the benchmark we should be working to. We are not even requested to disclose the guidelines we have chosen to work to in our reports. I believe that our letter of instruction should include the principle of the law for assessing compensation. My understanding of case law is that care experts should follow a “needs-led” approach, not the “funds-led” approach of our British statutory services. In my opinion it is unwise of lawyers to assume that care, or any other type of expert for that matter, will have done extensive background reading about the law. Lawyers should not let experts, in effect, set their own exam papers.

## Conclusion

I have tried to set out some of the inadequacies and dilemmas in the current system that care experts face on a day-to-day basis. In “Access to Justice” Lord Woolf identified amongst the key principles that the system should be “just in the results it delivers” and “be fair in the way it treats litigants”. When he discussed the quality of experts’ reports he identified that the legal system needs to ensure that “experts are given adequate instructions”. He goes on to mention that “many experts have however indicated that they would welcome more detailed and explicit instructions”. This is still the case!