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Care Claims – Working with Care Experts for the Right Outcome

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Why focus on care claims?

- > Depending on the applicable law, this can be the **single biggest head of loss**.
- > Unsurprisingly, often a **contentious** area:
 - > Model of care package
 - > Future needs
 - > Deterioration with ageing or as medical condition progresses
- > An aspect of the claim which requires **a huge degree of coordination** between factual documentary evidence, factual witness evidence and other expert evidence, notably medical experts.
- > If you do not secure the right outcome then **your client will really feel it** many years down the line and may have to **fall back on state provision/benefits**, which are increasingly challenging to secure.
- > Plan is to explore the issues through **ten over-arching tips** as a basis for discussion.



Tip no. 1: consider whether you even need a care expert

- > Not all cases **will necessarily call for care expert** evidence.
- > Is care a **recoverable head of loss**?
 - > Consider the applicable law.
 - > Obtain a preliminary view from a foreign law expert on whether care (gratuitous or professional/paid) is recoverable and, if so, on what basis / any limitations on recoverability eg caps on damages.
 - > Are there guidelines on care rates, notably for gratuitous care where the actual rates in the country where the claimant lives may be less relevant when assessing damages?
 - > Check with your co-counsel, where applicable, before embarking on expert evidence gathering.
- > Obtaining **witness statements** from the claimant and those involved in supporting the claimant may help inform what is being done on the ground in the absence of a formal, professional/paid care package.
 - > Such witness evidence will not only be key in understanding the gratuitous care provided by family, friends etc., but it may help shine a light on unmet care needs, therefore, whether a care expert can add value to the case.
- > What do the **medical experts** say about care needs?
 - > In proceedings in E&W, the care expert's recommendations will be led by what the medical evidence reveals as to the claimant's condition and prognosis, including likely future deterioration. This will help establish if care is an issue in the case that requires care expert opinion.



Tip no. 2: check the court will allow a care expert

- > What expert evidence **will the court allow**?
 - > In some jurisdictions, this can be very limited. The **scope of expert evidence** permitted may be a factor when advising your client on where to bring proceedings, if there is a choice of forum, as generally the nature and scope of expert evidence is a matter for the law of the forum, even if a different (foreign) law applies to the assessment of damages.
 - > ***Wall v Mutuelles de Poitiers*** [2014] EWCA Civ 138: this is the seminal case interpreting Arts 1.3 and 15 of Rome II, where the Court of Appeal in E&W held that **the law of the forum governs the way in which evidence of fact or opinion is to be given**, not the applicable law pursuant to Art 4 of Rome II.
- > Even in E&W, where the rules on admissible expert evidence are more wide-ranging, the court will only give permission for the parties to obtain and rely upon **expert evidence that is reasonably required** to resolve the proceedings: see in particular E&W Civil Procedure Rules 35.1 and 35.4.
- > In most catastrophic injury cases, the need for care expert evidence is rarely contested, but it might be, particularly if **a foreign law applies** and heavily restricts what can be recovered for care – the defendant may oppose a claimant’s request for permission to obtain and rely on such evidence.



Tip no. 3: very carefully select your chosen expert

- > Make **diligent initial enquiries**, including asking about professional indemnity insurance and judicial criticism the expert may have received in the past.
 - > Check your expert's CV very carefully.
 - > Get a sense of their experience as an expert and how many reports they typically prepare a year (a high number is not necessarily a good thing).
 - > What is their split of work between claimants / defendants / joint instructions.
 - > Does the care expert also have **case management experience**?
- > Check they have the **availability to report within the required timescale**, particularly if there is a court order directing the deadline by which a report must be served. Work backwards from that deadline, thinking about all the steps that will need to be taken to prepare the report for service.
- > Get **a clear estimate of costs** and keep this under review, including asking your expert to confirm again when they have seen the volume of case documents.



Tip no. 3: very carefully select your chosen expert...continued

- > Most importantly: ensure the expert has **the right expertise for the issues** in the case.
 - ***CCC v Sheffield Teaching Hospitals NHS Foundation Trust*** [2023] EWHC 1770
 - > Of the Defendant’s Expert, the judge said:
 - *“Mr Chakraborty’s evidence in relation to care was flimsy and unimpressive, but more important, I consider that Mr Chakraborty **is not an expert** in constructing, designing and managing care packages for children with cerebral palsy”*
 - *“I do not consider that he was acting within his CPR Part 35 responsibilities professionally or properly”*
 - See also ***Dobson v Chief Constable of Leicestershire Police*** [2025] EWHC 272 (KB), where the judge preferred the expert with direct experience of the issue in question in a case of alleged negligence of the police when releasing the claimant from custody without an effective mental health assessment.



Tip no. 3: very carefully select your chosen expert...continued: the expert's perspective

As an expert

- > Are you **qualified and experienced** in working with people with this **type of injury** and in that **jurisdiction**?
- > Are you the right person for the job?



Tip no. 4: get the timing of instruction right

- > Timing of instruction requires thinking and planning. Are you obtaining the evidence with a view to settlement negotiations? Or is it required to meet a court deadline?
- > You will want to have **sufficient evidence in play**:
 - > Risk assessments regarding requirements for care, notably when claiming for double-up care.
 - > Is specialist input required to inform the care expert's recommendations, for example bladder and bowel care regime, training needs for carers, supervision and oversight. This could be highly relevant to the care expert's views on future needs in certain cases.
 - > Care records.
 - > Case management records.
 - > Witness evidence.
 - > Medical expert evidence.
- > **As an expert:**
 - There must be some evidence for the care expert to base their opinions on. Early reports can be helpful if there is medical evidence that can be relied upon.
 - Leave plenty of time for the care reports. They take time to complete well.
 - Send the expert everything you think might be relevant; if something changes, highlight this to them as it may affect their opinion.



Tip no. 5: the letter of instruction is key

- > Diligently prepare the letter of instruction and, as an expert, diligently review the content of the letter of instruction.
- > Think about how you can help your care expert with the documents/instructions you provide eg would a **summary of pertinent care records** assist them?
- > Does your expert understand their **responsibility to the court**?
- > Be alive to the possibility that in some circumstances you may have to **disclose your instructions** and accompanying documentation. In E&W, the instructions are not privileged, so to avoid issues around disclosure of the instructions, the expert should ensure they state the substance of all material instructions they have received and the basis on which the report is written.
- > Make sure your expert knows they need to be careful when preparing any document for the court.
- > ***ABC & Ors v Derbyshire County Council & Anor*** [2023] EWHC 986 (KB) (28 April 2023) "*Mr Barratt said he **could not recall receiving formal letters of instruction**. He also accepted that despite his signed declaration of truth to contrary effect, he was **not aware of the requirements of Part 35 of the Civil Procedure Rules, Practice Direction ("PD") 35, the Protocol for the Instruction of Experts to give Evidence in Civil Claims (albeit that this was replaced in 2014 with the Guidance for the Instruction of Experts in Civil Claims) or the PD on Pre-Action Conduct, before signing his report.***"



Tip no. 5: the letter of instruction is key...continued: the expert's perspective

For the expert

- > Make sure you have what you need.
- > Review the instructions and highlight any queries early.
- > Leave enough time to prepare a solid report; don't rush it.
- > Remember, the **duty is to the court.**



Tip no. 6: prepare for the assessment appointment

- > Remote vs in-person assessment.
- > You will probably not be attending, but this does not mean a passive role for the lawyer as the assessment date approaches.
- > Prepare your client and anyone attending with them.
- > Make sure anyone else the expert needs to speak with to inform their evidence is available. This may include family members but, importantly, also **the rehabilitation case manager**, who will no doubt be playing an integral role in the monitoring of the care package in place.
- > Ensure the expert is provided with any updated material and has access to what you have sent:
 - This will save time and costs, as the expert’s draft report will be based on the very latest information and should then have as sound a factual basis as possible at the point the report is produced.
 - It may also add considerably to the recoverable damages.
 - > In ***KTW v Meek & AXA*** [2024], the care expert had reported in April 2023 and then again, just 5 months later, in September 2023. During this short period, not only had there been a significant increase in care costs generally, but KTW had started to access the community more often, with a risk assessment revealing he needed double-up care when using his motorised wheelchair. **By ensuring the care expert had taken these important changes, within a very short timeframe, into account, KTW received over £2.5m in additional damages.**



Tip no. 6: prepare for the assessment appointment...continued: the expert's perspective

As an expert

- > Prepare for the assessment and check the details as you go.
- > Speak to the case manager if possible; they are on the ground.
- > If there is a change, consider the impact on your opinion.



Tip no. 7: leave plenty of time to refine and finalise the evidence

- > Make sure to test your expert carefully before trial. This links back to planning – it can take many months to find time to get all of the experts and legal team in a case together at the same time to discuss the evidence.
- > Beware relying on **untested opinion as to heads of loss** in any schedule of loss.
- > Ensure experts have considered, addressed and referred to **relevant documents** in their reports, including any updated information. Be sure to bring your opponent up-to-date with key disclosure if you know they are also obtaining expert evidence.
- > ***Beatty v Lewisham and Greenwich NHS Trust*** [2023] EWHC 3163, illustrates the risks of not checking re: judicial criticism of the expert pre-instruction but also how **things can unravel at trial if the expert is not robustly tested on their evidence pre-trial**. The case involved a claim arising from alleged negligent failure to investigate whether Ms Beatty had developed an embolism, resulting in a below-knee amputation. The Claimant’s vascular surgeon expert, Mr John Scurr, was subject to extensive judicial criticism by Mr Justice Jay, who rejected his evidence, commenting that Mr Scurr was:
 - > “Combative in answering...perfectly fair and reasonable questions”
 - > “Unacceptably terse” with the judge observing: “An expert is required under the CPR to set out the reasoning for his conclusions. This obligation exists even if the reasons seem blindingly obvious to the maker of the opinion.”
 - > “...betrayed at several points in his evidence a degree of partisanship which came close to advocacy.”
 - > **Failure to identify key issue in the case and provide reasoning.**
 - > Reached an opinion in written evidence without considering the Defendant’s statement.
 - > Had been the subject of prior judicial criticism in ***Kennett v East Kent Hospitals NHS Foundation Trust***, Canterbury County Court, 31st July 2018.



Tip no. 7: leave plenty of time to refine and finalise the evidence...continued: the expert's perspective

As an expert:

- > Do your **research**, look at the **context**, and consider the impact of:
 - > Culture
 - > Location
 - > Supports available in the location where the claimant lives.
 - > Cost for the client's **individual situation** is not the norm.



Tip no. 7: leave plenty of time to refine and finalise the evidence...continued: the expert's perspective

- > Remember, the **duty is to the court** to remain compliant. Cotter J stated relatively recently in *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB) at [284]:
 - > "Experts should constantly remind themselves through the litigation process that **they are not part of the Claimant's or the Defendant's "team"** with their role being the securing and maximising, or avoiding and minimising, a claim for damages. Although experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any professional code, as CPR35.3 expressly states, they have, at all times **an overriding duty to help the Court** on matters within their expertise. That they have a particular expertise and the court and the parties do not ... means that significant reliance may be placed on their analysis which **must be objective and non-partisan** if a just outcome is to be achieved in the litigation."
- > **Case conferences** are valuable in understanding evidence and refining opinions.
- > **Change of opinion** where the evidence supports this, eg move from nursing care to HCA support.



Tip no. 8: scrutinise, compare and contrast your own expert evidence, again and again, and do the same when you receive the other side's evidence

- > Has the other side's expert read and considered **everything of relevance**?
 - > How has the care expert dealt with issues such as statutory provision?
 - In ***Benjamin Scarcliffe v Brampton Valley Group Ltd*** [2023] EWHC 1565, the judge was highly critical of the claimant's care expert evidence relating to the claimant's ability to provide care to his children and a review of statutory assessments as to the claimant's care needs. C's expert still failed to address deficiencies in her evidence when given the opportunity by the judge during the trial. Consequently, the judge was highly critical of the expert. The case further underlines the importance of the expert being provided, in a timely fashion, with **all relevant case documents**.
- > How might their **evidence be undermined**?
- > Prepare a table with **a side-by-side analysis of each side's care expert evidence** and recommendations, as well as the difference this makes to the overall damages claim.
 - > You may be surprised at how much scope there is for agreement.
 - > It will help to narrow the issues and with an understanding of what is genuinely disputed.
- > Get to work on **bolstering the additional evidence** needed to plug any gaps in your client's case on their care needs. Ideally, this should be done before joint statements and certainly well in advance of trial.



Tip no. 8: scrutinise, compare and contrast your own expert evidence, again and again, and do the same when you receive the other side's evidence...continued

- > More judicial criticism, of a suite of experts...
- > In ***Wilson v Ministry of Justice*** [2024] EWHC 2389 (KB), the Claimant brought a claim for damages against the MoJ for the life-changing injuries he sustained when stabbed multiple times by another prisoner in the prison kitchen at HMP Chelmsford. Mr Wilson had an incomplete spinal lesion at T5 to T7, amongst other injuries, and so evidence was given by a number of experts.
 - > The Defendant's expert spinal rehabilitation expert was heavily criticised by the judge for being: *"...a partisan witness who, unusually, agreed quite early on in his cross-examination...with the contention that he had lost all independence and objectivity in this case."* The expert subsequently conceded he was wrong.
 - > The Defendant's neuro-physiotherapy expert was also criticised. Despite having adopted a fair and independent approach in her initial report and joint statement, following service of surveillance evidence she had veered into a partisan approach.
 - > The Defendant's accommodation expert had based his evidence on an inadmissible report from the spinal expert. Again, an earlier independent and fair assessment had been "corrupted" by influence from the Defendant's lawyers.
- > Having a deep understanding of the issues the other side faces with its experts could be a significant factor when **assessing any offers to settle and the risks** of taking a case to trial.



Tip no. 8: scrutinise, compare and contrast your own expert evidence, again and again, and do the same when you receive the other side's evidence...continued: the expert's perspective

As an expert:

- > Carefully consider what the the other experts, claimant, and defendant have proposed.
- > Be aware as to why your opinion differs:
 - Context
 - Culture
 - Intensity



Tip no. 9: give clear instructions before any joint expert discussions and make sure the experts have plenty of time to complete their joint statement

- > The joint discussions of experts and their subsequent joint statement aim to assist the parties and the court with narrowing the issues in dispute. The experts should set out the areas on which they agree and those where they disagree, giving reasons for any disagreement. The **discussions are privileged**; the statement the experts produce is not.
- > **Agenda** for a joint discussion of the experts?
 - There may be limited time to agree an agenda with the other party or parties. Experienced experts will know how to approach discussions, but an agenda (even if not agreed) may help focus discussion on key issues when you are instructing your expert to prepare the joint statement.
- > In E&W, lawyers should not have any input in the preparation of the joint statement. See ***Glover and another v Fluid Structural Engineers & Technical Designers Ltd and others*** [2024] EWHC 1257 (TCC), a property dispute where C's expert sent drafts of the joint statement to C's solicitors who made comments and proposed amendments to the drafts. C had to apply for permission to obtain and rely upon a new structural engineering report: a costly mistake!
 - "Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that Joint Statement. Any such concerns should be raised with all experts involved in the joint statement."
- > ***CCC v Sheffield Teaching Hospitals NHS Foundation Trust*** [2023] EWHC 1770: previously mentioned above, issues arose with an error in the care expert joint statement relating to waking night care. It is best to be candid and open if such issues arise.



Tip no. 9: give clear instructions before any joint expert discussions and make sure the experts have plenty of time to complete their joint statement...continued: the expert's perspective

As an Expert

- > Prepare and know your and the other expert's reports.
- > Know why you differ.
- > Know the issues.
- > Consider any new evidence or reports. Does this change any of your opinions?
- > Consider the range of opinions.



Tip no. 10: present a robust, evidence-based pleading and understand the areas for concessions in negotiations

- > Most cases settle and do not go to trial.
- > Be **realistic. Critically analyse and challenge** the expert's assumptions, recommendations and costings before pleading the claim.
 - In ***Benjamin Scarcliffe v Brampton Valley Group Ltd*** [2023] EWHC 1565, Mr Justice Cotter noted: "In my experience the content of care reports is sometimes transposed directly into schedules and counter-schedules by lawyers with limited critical analysis or challenge."
- > **Iron out any issues with your expert pre-negotiations** (and certainly pre-trial) as you prepare the schedule of loss, when you receive the counter-schedule of loss from the other side, and as you prepare for the settlement meeting and advising your client on the reasonable range of outcomes (this applies to both sides).
- > Consider **a pre-settlement meeting conference call with your care expert** to test their evidence and the areas you can push, as well as those you can potentially concede, in negotiations.
- > In particularly entrenched cases with issues such as double-up carer provision, **think innovatively** about how you might resolve the issues, for example: can your care experts be invited to have a without prejudice discussion and mini joint statement process on focused areas of contention to assist the parties in settlement negotiations?
- > It may sound obvious, but **don't forget to involve the client, their family and their case manager** to get a realistic feel for what they might do in the future, as this will be highly relevant to determining the right outcome in negotiations.

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CARE EXPERTS FOR THE RIGHT
OUTCOME



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Questions?

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