An exercise in persuasion

Stephen Cottrell outlines the art of drafting schedules of loss in catastrophic injury claims

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Catastrophic injury cases are difficult to define – but you tend to know one when you see one. Clearly, severe traumatic brain injuries and 'complete' spinal cord injuries fall within this category, but so too do some very severe orthopaedic injuries. For present purposes, a 'catastrophically injured' claimant will:

- have virtually no residual earning capacity;
- have very substantial care and accommodation needs; and
- crucially, still have the ability to enjoy life.

It is tempting to fall into the trap of thinking that the most severely injured claimants' damages are straightforward to assess – they will need a bungalow, a modified car, 24-hour care and lots of therapies – surely the schedule takes care of itself in the light of the expert evidence. If you are acting for a claimant, that is precisely what the defendant wants you to think. The skill of drafting a schedule is in adding value. Most practitioners can recycle extracts from the expert reports and add up figures, but in order to add value the schedule must present the claimant as an individual. What makes this client different from any other L4/5 paraplegic (for example) from the point of view of the court and the defendant?

One major difference between catastrophic schedules and pleadings in other cases is that, in the vast majority of personal injury and clinical negligence cases, pleading a schedule means emphasising all the things that the claimant now can't do (work, play with grandchildren, drive a manual car) whereas in catastrophic injury cases the emphasis should be on what the claimant still *can* do. There is a great deal of value to be found in the cost of helping the client to live as varied and rewarding a life as possible. The ideal injured claimant for a defendant is one who spends their time sitting at home watching daytime TV and eating takeaway food; an active claimant with similar injuries may well be able to establish claims for a sport wheelchair, outdoor holidays in the UK (as well as holidays abroad) and the cost of being accompanied to various therapeutic activities. At least as importantly, a claimant who is encouraged to participate in such activities will have a better quality of life and may well live longer. While not strictly related to the schedule, the claimant's lawyers and experts who encourage a client to maximise their recovery and participate in these activities at an early stage – and can say so in the schedule – will have a good chance of maximising medical and financial recovery.

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The purpose of the schedule

The schedule in a catastrophic case is likely to be the cornerstone of the claimant's case. It is the first, and perhaps the only chance, for the claimant's lawyer to be an advocate. It needs to be much more than an old-fashioned 'shopping list'. It should be written with an audience of three in mind:

- the claimant;
- the defendant's insurer/NHSLA; and, most importantly,
- the trial judge.

The claimant needs to sign the schedule so needs to be able to understand it (or at least the non-mathematical parts of it) and needs to know that their legal team have their needs and concerns at heart. The schedule is, of course, a presentation of the claim at its highest and it is imperative that the claimant should understand that the schedule does not represent the likely settlement value of the claim.

The defendant's insurers need to be convinced of the merits and value of the claim and need to be persuaded to set their reserve as high as possible. They also need to be persuaded that the claimant is not naïve or blind to risk.

The ultimate reader is the trial judge. A thorough schedule should be a reference point for the judge at trial, to which they can return throughout the case. The schedule should portray the claimant in a positive light.

The schedule as advocacy

The vast majority of cases are settled without trial. Many are settled without a joint settlement meeting (JSM). With the advent of the new oppressive court-fee regime many more will be settled pre-issue. The schedule is a massive opportunity for the claimant's legal team to make their case. It may in fact be the only opportunity before settlement to put the claimant's case.

No advocate would go into a trial without knowing the evidence; likewise a good schedule whether 'preliminary', 'without prejudice' or 'final' should be prepared only when the claimant's lawyers are fully *au fait* with the evidence of the claimant, their family and their experts. That is likely to mean early conferences with the experts. Whether at JSM or on an application for an interim payment, the defendant will exploit any uncertainty in the expert or lay evidence. The schedule should demonstrate that the author knows the case.

The schedule should begin with a clear, detailed narrative. It should tell a story that the 'audience' can follow easily – start with a concise description of the injuries but rather than spending several pages digesting the medical reports with a list of operations and therapies, the schedule should move relatively quickly to describe the effect of the injuries on the claimant. The emphasis should be on 'selling' the claimant as an individual: what did they like to do before and what will it take for them to do it again? For example, if they were a biker and has now had an amputation, is a specially adapted motor-trike a possibility? What sets this claimant apart? In the case of a tetraplegic claimant, are they suffering particular pain?

Advocacy is not just about highlighting the strong points of the claim – it is about convincing the audience that the author is aware of the weak spots, acknowledges them and, where appropriate, can explain why they do not adversely affect the claim. For example, if the claimant obviously needs a five bedroom bungalow with space for wheelchairs, scooters, carers and a therapy room/gym, but due to lack of funds has decided to rent a cluttered, two bed ground floor flat round the corner from his elderly parents who are providing care, and has told the defendant's spinal expert that they like living there and does not want to move (despite it being obviously inadequate for their needs) do not wait for the defendant to take the (bad) point – meet it head on. Spend a paragraph under the accommodation' section explaining why the current situation will not be acceptable in the long term (the parents will be unable to continue providing care forever, the carers will need their own room etc). This approach gets you on the front foot, tells the insurer that you have thought about the case, gives the defendant nowhere to go in the counter schedule and negotiations and lets the judge know that you have considered the weaknesses as well as the strengths of your claim.

If a point cannot be explained away, drop it. For example, if your care or OT report is putting forward claims for items that are clearly never going to be accepted or used by your client, don't claim them. More to the point, highlight the fact that you are not claiming them – this shows the judge and the insurer that you are not slavishly following the reports and that your client is realistic and not greedy. Where an unreasonably high figure is used by a care expert (for example) you should think about an alternative approach that does not undersell the claimant. For example, a brain-injured claimant in their forties with supportive parents in their late sixties might be very reluctant to accept 'buddy' type carers to take them into town or to the pub and pleading a claim (supported by the care expert) at full value from the date of the schedule might be untenable, but

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what will happen when their parents are 75 or 80? Merely pleading a gratuitous care claim will be inadequate. Speak to the claimant and come up with a solution that is likely to be acceptable to all concerned – the client is likely to need commercial 'buddy' care in the future – it is likely to be introduced gradually rather than overnight. What is a realistic model?

There is nothing less attractive in a schedule than claiming something that you are not entitled to as a matter of settled law – the worst example which I come across all too often is gratuitous care claimed without a 25% discount.

Where there are various options and you have selected the most expensive one, explain why you have done so. Why is this car needed and not that one? If possible, use examples of how things have gone wrong in the past with the cheaper option. Similarly, if a particular piece of equipment, therapy or activity has had a positive effect on the claimant, say so – facts are much more persuasive than theorising.

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As a piece advocacy, try to ensure that your schedule cannot be outflanked.

Periodical payments or capital losses?

CPR 41.5 permits a party to state whether a lump sum or PPO is more appropriate. If your client wants a PPO for part of the claim, the schedule should say so (even though the loss is likely to be quantified on a multiplier/multiplicand basis in any case).

Typically, care, case management and some therapies will be subject to a PPO. There are other losses that are entirely capable of being subject to a PPO, such as Court of Protection fees and loss of earnings. Explain why you want a PPO and what index should be used (ASHE will be suitable for some, but not all heads of loss).

Following the case of *Wallace v Follett* [2013], the cost of having the claimant subjected to annual

future medical examinations should be met by the defendant and claimed in the schedule if PPOSs are sought.

Multipliers

Ensure that you maximise the figures. If life-expectancy is an issue, should you be using Ogden table 28 (for terms certain) or tables 1-2? There are a number of cases on this (for example, a good summary of the use of table 28 over tables 1-2 is found in *Reaney v University of Hospital of North Staffordshire NHS Trust* [2014], 2nd judgment of Foskett J, paras 10-13).

Bear in mind that working lives are getting longer, pension ages have increased and younger people are highly unlikely to be able to retire at age 65.

Hobbies, holidays and leisure

As stated at the outset, these can add significant amounts to an already large claim, and can also enrich and prolong the claimant's life.

The starting point has to be what the claimant did before, but is no longer capable of doing. Is there a way of enabling the claimant to take part in a disability sporting activity, outdoor pursuit or hobby? Is the claimant willing to engage in this? How much will it cost and how has it helped the claimant so far?

Where the claimant, particularly a young claimant, is now unable to participate in ordinary, free, social activities there may be a strong justification for the claimant to participate in supervised and organised activities. A good example would be a brain injured child who is unable to play with friends after school but needs a social life; that child may well need to be provided with funds to participate in social activities in a supported setting. Merely making an unexplained claim for these kinds of activities (drama lessons, sailing etc) will be met with raised eyebrows in an insurer's office or on the bench, but a proper explanation can make these claims seem not only reasonable but incontrovertibly necessary.

Presentation

The document should be user-friendly with headings, easy to read, with plenty of space for the judge to make notes, a good summary at the end, clear appendices and good summary and the figures added up.

A schedule will not be persuasive if it is difficult to follow.

Future developments in technology

As technology continues to improve, the cost of having more advanced equipment (whether wheelchairs, prosthetic limbs or assistive technology) may bring an increased direct cost to that part of the schedule, but the author of the schedule needs to be ready to concede that the provision of such cutting-edge equipment might mean that other aspects of the schedule such as care might reduce. A persuasive schedule will acknowledge this.

Highlighting the benefits of early intervention

This is especially relevant where the schedule is prepared for an interim payment application. Releasing funds at an early stage in one part of a claim may well bring down the level of another part of the claim. Employing a neuropsychologist for a brain injured claimant may promote their prospects of maximising their recovery, potentially improving their prospects of independence and employment. A claimant who is in a suitable bungalow with full wheelchair access throughout, a wet room and low-level kitchen surfaces will need less care. It is difficult for a defendant to argue against the provision of funds for treatment and accommodation in these examples. It is vital to make the argument explicitly in the schedule.

Conclusion

Schedules in catastrophic injury cases cannot be mere shopping lists. They are pieces of craftsmanship rather than works of art, designed with the needs of the claimant in mind and presented as attractively as possible for the benefit of the defendant's insurer and the judge.

As with all forms of advocacy, preparation is key and the claimant's legal team needs to be on top of the lay and expert evidence before the schedule is drafted.

A good schedule will persuade the judge of the strength of the claimant's case; an excellent schedule will persuade the defendant's insurer. To achieve that aim the schedule needs to deal not only with the claimant's case but also with the objections that are likely to be raised in the counter-schedule, which should be knocked down before they are raised. The schedule should make it clear that the claimant is not ignoring the weak points in the case. If you can portray your client as an individual and cut off obvious escape routes for the defendant, you will increase your client's prospects of good settlement. If you can persuade the defendant to pay for the cost of hobbies, therapies and holidays you may well maximise the claimant's chances of enjoying their life as well as their damages. ■

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Reaney v University of Hospital of North Staffordshire NHS Trust [2014] EWHC 3016 (QB)

Wallace v Follett [2013] EWCA 146