

Information

Court of Protection expert witness service

Introduction

In personal injury and clinical negligence cases, where the claimant has sustained a brain injury, they may be deemed to lack capacity to manage their property and financial affairs for the purposes of the Mental Capacity Act 2005. In such cases, the appointment of a deputy is likely to follow, as the claimant will not have the capacity to manage their damages award.

The deputy will often be a professional, experienced in managing large damages awards.

In such situations, the deputyship and Court of Protection costs are a recoverable head of loss and will form part of the damages award. Professional fees and disbursements can have a significant impact on the value of personal injury and clinical negligence claims. Depending on the claimant's life expectancy, this head of loss can amount to a significant sum.

Why is an expert witness required?

As with any head of loss, it is extremely important that future Court of Protection fees and disbursements that may be incurred are properly quantified. No two cases are the same and there is no 'one size fits all' approach that can be taken. It is important to look at the individual circumstances of each case, and the specific impact that the injury has had on the particular claimant.

It is vital from both the claimant's and defendant's perspective that a claim is properly quantified, and that any estimates are realistic and proportionate bearing in mind the individual circumstances of each case.

Thomson Snell & Passmore

Thomson Snell & Passmore's Court of Protection team has been ranked by Chambers and The Legal 500, two independent legal directories, in the top tier for Court of Protection work in the UK. We are one of only three firms in the country to achieve this status.

Brian Bacon is a highly regarded expert with many years of experience, and is individually ranked as a 'Leader in the Field', by Chambers.

Partners in the firm, both personally and as Directors of our Trust Corporation, act as the professional deputy in over 250 cases. The majority of the cases where we act involve individuals who have suffered an acquired brain injury or birth trauma. We are able to draw on this wealth of experience when estimating future costs.

We are frequently instructed by both claimant and defendant personal injury and clinical negligence lawyers to prepare CPR compliant expert witness statements, addressing the likely future costs that will arise as a result of the appointment of a professional deputy. Our work, however, is predominantly for claimant solicitors.

We also act as a single joint expert, and provide a service to defendants where we will provide an informal commenting, or formal reports, if required, on costs that have been claimed by the claimant's expert.

We are also able to provide:

- evidence and advice on issues surrounding capacity and the use of personal injury trusts for vulnerable individuals who have capacity, but wish to shelter their award

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- statements that consider the likely costs of setting up and managing a personal injury trust where there is a professional trustee
- evidence in Court in personal injury and clinical negligence proceedings, where matters do not settle before trial.

When is an expert witness statement required?

As soon as it is apparent that the claimant lacks capacity, and liability in the litigation has been admitted or settled at trial, the appointment of a deputy and the question of quantifying future deputyship costs, should promptly be considered. If a deputy is to be appointed, an expert witness statement should be prepared. This can be done even if the application to the Court of Protection is yet to be made.

Costs database

Our Court of Protection team keeps detailed records of the deputyship costs incurred for clients who have an acquired brain injury or a brain injury as a result of birth trauma. These costs have been assessed by the Senior Courts Costs Office (SCCO). This database provides us with an invaluable foundation for estimating likely future deputyship costs in comparable cases.

Statement contents

Our statements will deal with issues such as:

- the likely appointment costs
- past costs that have been incurred by a deputy that is already in place
- general management costs likely to arise pre-settlement
- general management costs that will arise post-settlement, on an on-going basis
- other matters such as the costs of a future change of deputy; Statutory Will applications; and provision for unforeseen events by way of a contingency fund
- any other factors that may affect the likely level of costs, such as any behavioural difficulties the client may exhibit as a result of their injuries, or whether the deputy is likely to be involved in a property adaptation project
- we also deal with the regular on-going, and any one-off, disbursements that may arise, such as Court fees and the likely level of the security bond premium.

Information we require

As is the case with all experts we do need to be provided with sufficient information to enable us to get a clear understanding of the client, their circumstances and any particular factors that may affect costs. It is however very seldom that it is necessary to arrange a meeting with the client.

The following documentation is likely to be useful:

- if a deputy is already appointed, the details of the person involved, a copy of the appointment order, and any information regarding costs that they have had assessed to date, or work-in-progress
- if no deputy is in place, details of who is proposed to act in that role, if known, and the details of their firm's location
- any recent witness statements from family or friends
- up to date medical reports on condition and prognosis

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- up to date reports from a neuropsychologist and/or neuropsychiatrist
- case management report
- evidence of the care expert
- accommodation expert's evidence.

If there are any significant areas of dispute between the claimant's and defendant's experts, then the reports outlined above, from both sides, would be beneficial.

Conclusion

It is of equal importance to obtain expert evidence on this head of loss as would be obtained from experts dealing with other issues such as care and accommodation.

Even if a client does not lack capacity, but may be considered as vulnerable, consideration should also be given and evidence obtained, on the costs of setting up and running a personal injury trust.

Our partners are extremely experienced in providing evidence of this nature and often speak to claimant and defendant litigation lawyers at internal seminars and discussions, addressing these key issues.

Disclaimer

This information sheet has been prepared to highlight some key points relating to the provision of an expert witness statement dealing with Court of Protection and deputyship costs. It is intended to be for general guidance only and is not a substitute for specific advice.

If you require further information, please contact Brian Bacon, Rosalind Hamlyn, Catherine Fuller or Tom Hall on 01892 510000 or by email at:



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