

PRACTICAL PERSPECTIVE

SARAH MAWDSLEY OFFERS A HANDS-ON GUIDE TO ORGANISING CLAIMS INVOLVING BRAIN INJURED CLIENTS

Brain injuries can range from the subtle to the most severe, all of which need to be managed differently.

At one end of the spectrum, those with very serious brain injuries may lack capacity, and getting an appropriate litigation friend is of course the first consideration. From a case management perspective, the case can progress more smoothly if the client has that support, both with the litigation, and also the practicalities of running a PI case, for example getting them to the plethora of medical appointments needed.

Bear in mind however, that a traumatic brain injury has a significant impact not just on the claimant, but also on their family and loved ones. While our primary focus may be progressing the litigation and arranging treatment for our client (if we are lucky enough to have the funding), the family may be grieving the loss of the person they knew before. The claimant will be extremely dependent on them in all other aspects of their life, particularly in the early stages. Litigation will be one more thing on their plate, and so this must be handled with care.

Expectations from the brain injured client and their family at the outset may be unrealistic. They may believe the case will be settled in a matter of months. Further, it is quite usual in the early stages that people consider they will return to 'normal' after a period of time following their injury. They find it hard to cope with the effects when treatment is finished and they realise they are left with ongoing, permanent symptoms.

Where a brain-injured client remains with capacity to deal with their claim, this can be tricky

Effect of brain injury

Common effects of brain injuries can be:

- physical - impaired mobility, balance issues / dizziness, headaches, speech difficulties epilepsy, fatigue, loss of smell / taste;
- cognitive - memory problems, attention difficulties, information processing, insight and making decisions;
- emotional – depression, anxiety, frustration, anger, worry, PTSD, apathy, stress
- behavioural – disinhibition, impulsiveness, irritability, aggressiveness, obsessiveness, personality changes.

There may be a general sense that they are not the person they used to be.

Relationships and marriages can break down as the family can no longer deal with the strain, and the client's behaviour. They may now be at home all day when they had a full time job previously, and need assistance with the simplest of tasks.

The psychological effects can be huge. Depression is very prevalent after a brain injury, and while there will be the obvious initial shock, what usually follows is anger, denial and then depression. This can be the toughest time for the client and their family, and hopefully you can assist with the acknowledgement and acceptance of the effects of their brain injury.

If you can get a case manager and treatment as early as possible, this will help the ultimate outcome

Expectations from the brain injured client and their family at the outset may be unrealistic

Family support

While we have no control of the realities of the situation, it is important that we, as lawyers, support the family. Some brain injured claimants have extremely supportive families and others, unfortunately, do not. It is especially difficult when the injured person already has a problematic background such as alcohol dependency, substance misuse, are homeless or are in and out of prison, as is my experience. These people can fall out of even the acute treatment pathway, and certainly do not get any follow up. They can be difficult to engage in the litigation and are usually the most vulnerable.

A suitable and helpful litigation friend is vital. It is important to explain to them that you understand what a strain this can be, but they are fundamental to the case. Ensure you meet them and the family and keep in regular contact, especially where there may be big gaps in the litigation where you are waiting for medical examinations. This also allows you to get a good picture of where they are up to at that point, especially if they are not as cooperative as you would like.

Interviewing the family to consider the effects on the client can make all the difference. Friends and family will be able to give a better insight into how the brain injury has affected the client, who may be unaware of some of the issues they face. Work colleagues and associates are also helpful, particularly where someone has gone back to work. Get this evidence early, as it takes some considerable time to get to court and as a litigator knows, with the passage of time evidence can be lost.

Where a brain-injured client remains with capacity to deal with their claim, this can be tricky. It would be helpful to ensure again that you have met them and their family, and they are willing to provide support and assistance with treatment/appointments and general support (of course bearing in mind the duty of confidentiality). It can be daunting having a brain injury and doing all this alone.

Be aware that a client may be in and out of mental capacity throughout the case. Again, this can be tricky to navigate. Practically, ensure you have the correct retainer agreements with your client and litigation friend, and they are both involved throughout the whole of the litigation process.

It is important to be frank and honest with the claimant and their families and tell them what the litigation process will entail without overwhelming them. They will be expected to attend numerous medical appointments, some of which may take place over several hours of interviews and testing. It can be a difficult balancing act for a lawyer.

While it might sound obvious, regular updates to the client about medical appointments in the days leading up to them is advisable. Our experience is that for the best consultant neurologists, neuropsychologists and neuropsychiatrists, there are lengthy waiting lists. As such, do not just send the appointment letter when you get it, and hope they remember. They need constant reminders. Consider, does the client have someone to take them/ support them at the appointment? Do they have transport/do they have the funds? It may be more challenging for them to plan out a journey, and so they may require more help than the usual PI case to get them to appointments. (There can be nothing more frustrating than waiting a year for a medical appointment, only for the client to miss it!)

Communication can prove difficult. Consider the medium through which to contact the client. If they show impulsive and obsessive traits like sending multiple emails each day, then in my view it assists by picking up the phone and arranging a telephone conversation with them rather than sending emails back and forth. Their anxieties can be laid to rest in a simple phone call. Consider whether telephone, emails, video calls or face-to-face meetings are best at the time, for what you need to discuss. A brain-injured person may not be able to process certain conversations on the telephone, so these may need to be followed up in writing. A long introductory face-to-face meeting can cause fatigue, or the client may struggle to concentrate and retain the information. It may be better to break these up into multiple meetings or a follow up phone call to discuss different aspects at different times. Find out the best time of the day to contact the client and make a note on the file.

Continued on P43

Read judgments where your chosen expert has given evidence to assess the view of the expert evidence by the Court



Treatment

If the claim is straightforward and liability is admitted or you have a defendant willing to engage in the rehabilitation process, then the outcome is likely to be more favourable. Case managers can be involved to assist getting the treatment together and getting the client to appointments, and provide that support. Cases are much more challenging where liability is in dispute and this is not an option available to the client. They are at the mercy of the extremely stretched NHS, which may be amazing at proving the acute support, but does not regularly provide the necessary ongoing neuro rehabilitation and psychological support required. These are costly cases to run.

If you can get a case manager and treatment as early as possible for the claimant, then this will help the ultimate outcome and also their cooperation throughout the claim. Early interim payment applications are also advisable.

In the cases where this is not possible, then if they have not already been involved in a specialist head injury charity, Headway or similar charities can provide invaluable support. NHS Talking Therapies (a self-referral service) can assist for psychological difficulties. I also regularly put clients in touch with advisors to assess their benefits eligibility.

Ensure you know where the client has had treatment and obtain the entirety of the records before sending your client to a medical expert. Most experts can only make an accurate

prognosis two years post injury so be wary of this, as it may be costly to instruct an expert too early (unless you wish to issue proceedings for an interim payment) only to have to have the client re-examined at a later date. Again, it sounds rather obvious, but ensure you have all of the records and scans and the experts have the full picture. Neuroradiologists are regularly recommended to consider and interpret the brain scans, so there may be some back and forth.

Experts

The selection of experts is one of the most vital parts of the case, and something over which you have control if you plan ahead. Selecting the experts in the correct discipline with the most appropriate level of knowledge in the field means you can do the best for the client. These come with a hefty price tag and lengthy waiting list but in my experience, are worth it. Seek input from your barrister and your peers, and try to identify and read judgments where your chosen expert has given evidence to assess the view of the expert evidence by the Court.

Using an experienced, sympathetic barrister always helps; someone who understands brain injuries and more importantly brain-injured clients and can be adaptable to their needs. They can be flexible to see clients at pivotal times in the case. The barrister and lawyer need to understand the client's complex needs, and day to day, may have to deal with demanding and difficult behaviour.

Comment

Dealing with these claims are not for the faint hearted! You have to be extremely organised, but also resilient, with a thick skin to face the challenging clients and their families. But to help those at their most vulnerable has been some of the most rewarding work I have done.

Sarah Mawdsley is principal partner at Express Solicitors

They find it hard to cope when treatment is finished and they realise they are left with ongoing, permanent symptoms

Nothing is more frustrating than waiting a year for a medical appointment, only for the client to miss it

Interviewing the family to consider the effects on the client can make all the difference

