

# Developing Life Care Plans for Cases Involving Multiple Plaintiffs

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## Abstract

The field of life care planning developed as a tool used by rehabilitation professionals to effectively communicate the goods and services required during the lifespan of their clients with illnesses or disabilities. Life care planning became visible in forensic settings in the early 1980s, after it was realized that life care plans could similarly be used to inform the trier of fact in cases involving personal injury. Life care planning has since evolved into an essential component for estimating future medical requirements in a variety of legal matters. With the discipline's growing prominence and utility to the trier(s) of fact, the stakes for producing accurate and reliable life care plans are considerable. Though there are defined professional standards for developing life care plans for cases involving a single plaintiff, there is less published literature regarding cases involving multiple plaintiffs. As life care planners emerge from various educational and philosophical backgrounds without training in the complexities of the civil law framework, this article aims to introduce the theoretical and practical foundations of mass tort and class action litigation and to propose guidelines for life care planners involved in these types of cases.

## Introduction to Developing Life Care Plans for Cases Involving Multiple Plaintiffs

Since their inception in the 1980's, life care plans have become a crucial component of personal injury and tort litigation, and life care planner expert testimony is often considered paramount in outlining and justifying the future medical needs of an injured individual (Weed, 2009). Although forensic life care planners are engaged by either plaintiff or defense counsel, standards of practice (IARP, 2015) dictate a systematic methodology, to include: requesting and reviewing records, conducting a clinical interview with the injured individual, consulting with treatment providers when possible, researching market rate costs, and performing a cost analysis. The adherence to this proposed methodology increases the probability of creating a reliable and valid life care plan (Deutsch, Allison & Reid, 2003). Certification in life care planning is available to "qualified health professionals," resulting in the education, experience, and credentials of life care planners varying widely to include physicians, nurses, psychologists, vocational rehabilitation counselors, and other rehabilitation professionals (International Commission on Health Care

Certification, n.d.). As such, professional knowledge and awareness of the civil legal system is varied, and there are few published resources to guide life care planners in exploring the full potential of ways they may assist the trier(s) of fact in addressing future medical needs. In particular, there are limited professional resources to explain the role of the life care planner in cases involving multiple plaintiffs involved in mass tort or class action lawsuits.

## Personal injury litigation

Tort law, by definition, refers to a civil action seeking reimbursement for an individual or group of individuals who suffered losses due to the conduct of the defendant(s). A tort can be intentional, as when the conduct of the wrongdoer is dangerous and purposeful, or a tort can be negligent, as when the conduct of the wrongdoer is not purposeful but nonetheless reflects a failure to exercise reasonable caution. A third category of tort, strict liability, does not consider the intent of the wrongdoer but rather focuses on the fact that damages were incurred. Personal injury arises from a violation of tort law, and personal injury damages are the losses experienced as a result of the intentional or negligent conduct of someone else. The most common types of personal injury cases are motor vehicle accidents, workplace accidents, product liability, and slip and falls. Medical malpractice is another type of personal injury case; however, medical malpractice cases carry the assumption of negligence, rather than intention or strict liability (Bal, 2009.)

In personal injury lawsuits, the plaintiff(s) can seek punitive, economic and non-economic damages. Punitive damages are meant to punish the grossly negligent or intentionally harmful defendant and to discourage others from engaging in similar behavior in the future. Economic damages refer to the specific amount of incurred losses the injured individual has or will experience as a result of his or her injury, such as loss of income, loss of earning capacity, loss of work life expectancy, and future medical expenses. Non-economic damages refer to the non-specific and often unquantifiable aspects of the injury, such as pain, suffering, loss of consortium, reputational damage, and emotional distress. As such, non-economic damages do not carry the quantifiable justification of economic damages, and jurors may not be as sympathetic to claims of non-economic damages due to their intangible and subjective nature (Hebert, Guangya & Neil, 2014). Furthermore, most states have statutorily or legislatively capped non-economic

damages in medical malpractice cases (Nelson, Morrisey & Kilgore, 2007). No caps, however, generally exist limiting the amount of economic damages that can be awarded, resulting in increased demand for vocational and life care planning experts who can analyze, present, and defend their calculations regarding the economic repercussions of the injury being litigated.

When an individual sues for personal injury, the process of determining economic damages involves identifying the future medical costs and probable loss of economic earnings as a result of the injury. With regard to future medical costs, a thorough review of medical records, and conferences with the treating or consulting physicians typically provide the necessary medical foundation for recommendations, which can be supplemented by published literature and treatment standards. In fact, life care planners who include items in life care plans without proper medical justification risk legal challenges to the reliability and validity of their plans, and to their ability to testify as experts related to those plans. Specifically, they can face “Daubert” challenges when they do not satisfy the requirements for serving as expert witnesses, in part litigated through *Daubert v. Merrell Dow Pharmaceuticals* (1993). A life care planner may make recommendations within his or her practice and expertise (i.e. a vocational rehabilitation counselor may recommend a specific aid for independent functioning), though these recommendations should be clearly related to his or her area of credentialing to avoid challenges to the appropriateness of the recommendation. Aside from making recommendations, the role of a life care planner is to assemble, aggregate, and analyze information from various relevant sources into a coherent and comprehensive plan. These sources can include relevant clinical practice guidelines, published literature, and consultation with treatment providers. If the information gained from these sources reveals inconsistencies, the life care planner is tasked with resolving the discrepancies in an interactive, constructive manner. When multiple plaintiffs are involved, there is likely to be variation in the presentation of symptoms and claimed limitations, in addition to multiple treatment providers and/or medical experts with varied interpretations of those symptoms and limitations. As such, the ability of the life care planner to utilize critical thinking, problem solving, and effective communication to resolve discrepancies becomes even more important.

### **Class Action and Mass Tort Litigation**

There are various types of multiple plaintiff lawsuits, but of particular relevance here are class action and mass tort cases (often referred to as multidistrict litigation). Though in some ways similar to traditional one-plaintiff lawsuits, class action and mass tort cases have quantitative differences (i.e. multiple plaintiffs) that necessitate qualitative differences in the process and outcome. These nuances are important for life care planners who have been engaged in multiple plaintiff cases or who are looking to expand their

professional repertoire to include involvement in these cases.

Class action lawsuits refer to cases involving a group of individuals who have sustained similar injury or type of injury by the same causal source. Notably, there is a lengthy and rigorous process required to certify a class as a viable entity for filing a class action lawsuit, and the plaintiffs bear the burden of proving that all prerequisites have been met by a preponderance of the evidence. The types of injuries in class action suit range considerably, from exposure to a dangerous medication to sustaining harm from a deceptive marketing scam. In theory, class action lawsuits allow individuals with limited resources to join together with similar individuals to leverage a claim against a presumably heavily resourced defendant who could otherwise overwhelm the plaintiffs individually. In a class action suit, the mechanism of injury is typically identified first (i.e. chromium-6 in groundwater causes health problems), after which the “characteristics” of the class are identified (i.e. individuals living in Hinkley, California at the time that Pacific Gas & Electric (PG&E) was knowingly dumping chromium-6 in groundwater who developed health issues), and individuals who fit that class are recruited for participation in the suit (*Anderson et al v. Pacific Gas and Electric*, 1993). The case is then tried by attorneys on behalf of the plaintiffs based on facts and events that relate the behavior of the defendant to the general harm caused. Plaintiffs in a class action share discovery materials and representation and all claims are tried at once in a single court. Further, any award or settlement offered as part of a class action suit is shared proportionally among the plaintiffs, to the degree they have endured injury as a result of the defendant’s negligent or intentional conduct. In the case of PG&E described above, the settlement award was \$333 million, though after 40% lawyer fees and other “expenses” were subtracted, the 648 plaintiffs were left with approximately \$300,000 each.

Because the plaintiffs are not considered separately in class action lawsuits, the use of a life care plan has limited utility. However, a life care planner could act as a consultant to assist the attorney in developing a strategy for obtaining information from various medical experts regarding the medical issues likely to arise for the plaintiffs as a result of the defendant(s) behavior. Life care planners are adept at coordinating and consulting with multidisciplinary providers, and this skill could be applied to delving into the expected consequences of the defendants’ behavior, and mapping out the frequency and duration of treatment necessary to mitigate those consequences. In a case of exposure to a toxic chemical, a life care planner can be engaged to develop a general plan identifying the types of treatment likely necessary after such exposure, based on published clinical research and consultation with experts in the field. For example, if it were determined to be more probable than not, based on relevant research, that individuals exposed to the chemical would require periodic blood tests to screen for the

types of cancer associated with such exposure, in addition to ongoing treatment with a nephrologist to monitor damage to the kidneys, those items could be included in a general plan, with the costs associated with the likely treatment used as a guide for the request for damages. If no relevant research exists, the life care planner should conduct clinical interviews and consult the medical and rehabilitation records of a representative sample of individuals who have experienced similar injury or exposure. If the life care planner does not have the research methodology expertise needed to determine the parameters of a representative sample, a research methodologist should be consulted.

Mass tort lawsuits are similar in that multiple plaintiffs sue one or more defendants for damages associated with an incurred injury; however, in mass tort litigation, each plaintiff is considered separately, rather than as a member of a homogenous class. Again, the types of injuries in a mass tort lawsuit can vary, though the important difference is that the injuries are not considered to be uniform across all plaintiffs, and it would be inappropriate to fit all plaintiffs into one "class." In mass tort litigation, each plaintiff's case is heard individually, though sometimes in a single trial with the same jury to avoid excessive costs relating to educating multiple juries on the facts of a single incident. For example, a mass tort case involving a discrete disaster, such as an aircraft crash, could involve multiple plaintiffs claiming very different injuries, such as a specialized surgeon who lost the use of his hands and a recent college graduate who was not physically injured, but who experiences post-traumatic stress as a result of the crash. Though the same jury may hear and decide the two cases, the jurors are likely to award a larger sum of economic damages, in the form of lost wages and future medical needs, to the surgeon.

The individualized nature of the claim in mass tort litigation opens the door for developing life care plans for each plaintiff, and while this may seem an advantageous endeavor for the life care planner, it is important to understand the complexity of taking on such a task. Regardless of whether a plaintiff or defense firm engages a life care planner for involvement in a mass tort case, the life care planner should approach the situation as prepared as possible. Authors of this article have recently gained experience developing life care plans for mass tort litigation and offer some points for optimizing the effectiveness and efficiency of the process, with the goal of increasing the reliability and validity of the final product.

As a life care planner involved in mass tort litigation, it is important to suggest to the engaging attorney that steps be taken to ensure as much standardization as possible with regard to the medical management of the plaintiffs. Despite their varying injuries, the plaintiffs are likely to require similar types of treatment, though the intensity and duration of that treatment may vary according to each individual's specific injury. Since life care planning, at its core, is a tool of case management, it is appropriate for the life care planner to

rely on research regarding the mechanism of injury to predict the most appropriate types of treatment required post-injury. This is not to suggest that reviewing pre-injury medical records is unnecessary in these cases; in fact, these records are often of great value when predicting long-term outcomes for two individuals with differing medical history but who were exposed to the same injuring experience. Suggesting standardization in post-injury care is related to the efficiency of gathering all pertinent information. It is very time consuming, and thus costly, for the life care planner to gather the medical records and consult with treatment providers if all of the plaintiff's care is managed using different assessment and treatment protocols. Further, there is the issue of comparing multiple physician recommendations and conclusions with regard to future treatment needs. It is helpful for the purposes of consistency if there is a medical "quarterback" or coordinator who is responsible for examining all injured individuals, documenting future medical recommendations, and drawing causality. The caveat of this situation is that the "quarterback" should have education and experience relevant to the mechanism of injury to increase reliability of his or her recommendations and opinions. In situations where plaintiffs cannot be examined by the same medical provider due to geographic limitations, it is helpful for the medical coordinator to establish a standardized examination protocol with appropriate diagnostic studies to ensure accurate assessment.

Consider the situation whereby an explosion occurs at a chemical plant while approximately 100 workers are present, though at varying distances from the explosion. After acute medical care is provided, all workers are discharged home with instructions to follow-up with primary care. Some of the workers are adherent to this instruction and see their primary care physicians, while other workers do not follow-up but experience lingering difficulties. Once a lawsuit is initiated, it is likely that both the plaintiff and defense attorney(s) will engage a life care planner to aid in determining the future medical costs for each individual as a result of the explosion. To maximize the efficiency of this process, the life care planner should educate him or herself as to the probable effects of the injuring experience, such as damage to the eardrum from the noise, burns, orthopedic injuries as a result of falling, and psychological issues related to a perceived trauma. Equipped with this knowledge, the life care planner can suggest relevant, independent and qualified professionals to evaluate the plaintiffs to determine the specific effect(s) on each individual. While this process is underway, the life care planner should interview the individuals and review all pre-injury records to identify any pre-existing conditions or characteristics that may influence the individual's trajectory or outcome. For example, an individual with pre-existing psychological issues may experience more difficulty in coping with the experience or an individual who was 62 years old may experience more orthopedic issues as a result of falling compared to a 25-year-old worker. As treatment is

provided, the life care planner assembles and aggregates the future medical recommendations into a comprehensive life care plan for each plaintiff. Though the general template of the plan may be similar across individuals due to their shared mechanism of injury, each plan is individualized according to demographic variables, medical and psychological history, and geographical area. Even in two individuals for whom the same recommendations are made, it is highly likely that the frequency, duration, and geographically-specific costs of those recommendations will vary between the two individuals.

### Conclusions and Directions for Future Research

The field of life care planning has evolved since its inception to include practitioners with diverse educational and philosophical backgrounds. Great strides have been made in our field as professional organizations such as the International Association of Rehabilitation Professionals (IARP Code of Ethics 2007), the American Academy of Physician Life Care Planners (AAPLCP Standards of Practice, 2014), and others have developed ethical guidelines and standards of practice that are critical for guiding the behavior of life care planners, regardless of their professional disciplines and training. Given the utility of life care plans in delineating future medical costs for an injured individual, more work is required to establish a generally accepted methodology for including life care planning in the area of mass tort litigation that will bring a level of rigor and standardization for this emerging professional opportunity.

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