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Using a Life Care Planner when the Injury is Traumatic Brain Injury- Perspectives of an Attorney

Bruce Stern, Attorney at Law

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Introduction

Traumatic brain injury is on a continuum from mild at one end to severe at the other end. While those with severe traumatic brain injuries will usually need a lifetime of medical care and support in either the home or an alternative setting, those with mild traumatic brain injury will usually need much less and by trial may need more assistance with services and chores that can no longer be performed, rather than continued medical care.

When representing individuals with traumatic brain injury and their family, the plaintiff's trial counsel must retain a well-qualified life care planner who understands life care planning procedures, has knowledge about traumatic brain injury and adheres to the profession's standards and ethics to develop a comprehensive and reliable life care plan (Weed, 2010). The life care planner must be able to quantify the costs of future medical care and the support that will replace services that can no longer be performed. It is critical that the life care planner provide thoughtful input into the long-term medical, educational, rehabilitative, social–emotional, leisure, and vocational needs that will arise throughout the individual's lifetime. Through research and by consulting with treating professionals and knowledgeable experts, life care planners assemble information about the person with a traumatic brain injury's presenting problems and appropriate recommendations for present and future care (Shahnasarian, 2017). Key components in developing the life care plan include a consistent methodology, needs driven recommendations that are articulated to the specific individual and have a basis in the known medical and rehabilitation outcome research literature and strong medical, rehabilitation, case management and psychological foundations (Deutsch 2013; Jacobs, 2015).

In litigation today, compensation for non-economic damages comes under daily attack by those who seek to avoid responsibility and accountability. The plaintiff counsel's ability to present concrete economic losses to a jury becomes ever more important. This concept, known as anchoring is a particular form of priming effect whereby initial exposure to a number serves as a reference point and influences later judgments about value. The process usually occurs without our awareness (Tversky & Kahneman, 1974).

As Ball (2005, p. 175) explains:

> Jurors usually base their non-economic damages amount in large part on the economic amount. They use the economic damages amount as a benchmark and then discuss non-economics as some degree or proportion more or less of that amount. Thus, the higher, the more concrete, and the more persuasive your economic damages figure is, the more money you are likely to get for non-economics as well.

A decision must be made on whether the lifetime cost of the life care plan is high enough to "prime" the jury to return a sufficiently high verdict to justify its use.

Plaintiff attorneys have traditionally obtained reports on the need for future medical care from their client's treating or examining physicians; although this is necessary and may lay the foundation for the life care planner's later testimony, most such physicians are limited to providing acute medical care. Long-term rehabilitative care is not something the treating neurosurgeon routinely provides once the catastrophically injured person is through the acute life-threatening episode. The neurosurgeon generally discharges and refers the patient to the care of rehabilitative specialists. Very few physicians have the training or expertise to evaluate and prepare a comprehensive long-term life care plan (LCP) that involves the coordination of multidisciplinary professionals. In today's age of managed health care, physicians rarely know the reasonable or acceptable reimbursement rate for the treatment they, themselves, provide, let alone the reimbursement rate for treatment by other specialists. It is for this very reason that life care planning has evolved as a profession.

Many attorneys make the mistake of retaining a life care planner to address only the future costs of medical or rehabilitative treatment. Besides identifying these health-related services, the life care planner should also address quality-of-life and psychosocial and behavioral needs, and educational, vocational, recreational, home, and community support systems.

The need for periodic appointments and treatments, the monitoring and future costs of medication, and the possible need for and costs of supportive care loom large; however, for many with catastrophic injuries, the greatest losses reside in one's inability to perform or experience activities once an integral part of life. In most states, an injured person may seek reimbursement for all reasonable and necessary future medical costs causally related to the traumatic event. The debate over most life care planning concerns what should be

both reasonable and medically necessary. Unfortunately, a life care planner will often follow or adopt an insurance reimbursement model based on medical problems but not address the significant complications that arise in every aspect of an individual's life from the impact of an injury. According to Voogt (1996), however, the issue of quality of life is generally not addressed under this model. Some defendants' life care planners look to the least expensive treatment or prepare a plan that attempts to make use of free governmental services. Many a defendant's life care planner will argue that the plaintiff's family members can provide care that will reduce the need for outside providers and lower the costs of the life care plan. Unfortunately, such plans fail to compensate fully the injured plaintiff and do not return the individual and family to their position prior to the traumatic event.

Hiring a Life Care Planning Expert

Retaining the best-qualified life care planner is essential. Under the Federal Rules of Evidence and evidence rules in most state courts, a witness will qualify as an expert based on knowledge, skill, experience, training, and/or education (Fed. R. Evid. 702). The life care planner retained should be academically and clinically qualified (Sellars, 1996). The life care planner should be familiar with clinical management and long-term planning. In this day of specialization, some life care planners, for example, only work with individuals with brain injuries while others only work and have expertise with assisting individuals with spinal cord injuries or burns.

In 1996, the Commission for Health Care Certification offered the first certification examination for life care planners. The plaintiff's attorney should nevertheless look beyond simple certification and investigate the life care planner's academic training and work-related experience. The attorney should question whether the candidate has a broad breadth of experience in the rehabilitation field and attends continuing education to maintain and upgrade life care knowledge.

Another major consideration is whether the life care planner can present the life care plan in the courtroom setting or in deposition. Because court testimony is about persuasion and communication, the life care planner must be able to communicate complex issues in the life care plan, appear credible, and persuade the jurors they should agree with the planner's opinions. Cross-examination is one of the most difficult and challenging aspects of being a life care planning expert. Opposing counsel will work to lessen the expert's credibility by exposing bias, impeaching the expert with prior statements and writings, and challenging the expert's opinions, methodology, facts, and data.

Working with the Life Care Planner

Although preparing a long-term care plan may be premature at the outset, ideally the life care planner should be retained shortly after the attorney is retained, so the life care planner can work with the plaintiff's doctors and medical providers to help establish a workable plan for both acute and long-term care. The life care planner can also interact with insurance company adjusters and representatives to help avoid the common delays in medical treatment that patients and families encounter when dealing with insurance representatives. Because a life care plan is an evolving, dynamic document, early retention of a life care planner can facilitate development of an effective and well-considered plan for the plaintiff.

It is imperative that the life care planner interview the individual's family, besides visiting with and observing the person in the home environment. Using only a "record review" to prepare a life care plan is not only improper, but also subjects the life care planner to intense cross examination (International Academy of Life Care Planners, 2015; Kitchen, 2002). The plaintiff's attorney must obtain the plaintiff's medical and work records to properly assist the life care planner in formulating a life care plan. The plaintiff's attorney should also obtain a prognosis from each of the patient's physicians that includes their expectations for the care the individual will need.

Conversely, after the life care planner prepares the life care plan, the plaintiff's attorney should review it to ensure it provides foundational support for every recommended treatment. Anything that seems unnecessary or frivolous should be omitted as such items will undermine the credibility of the plan and destroy the jurors' confidence in the validity and necessity of every part of the plan (Ball, 2005).

Because a life care plan is a dynamic document and may need change or modification as time goes on, medical reports received from physicians and other medical providers that post-date the life care plan must be sent to the life care planner for his or her consideration and the plan should be modified or changed as required. It is inexcusable for an attorney to present a life care planner not furnished with all of the client's medical records, when such review could easily have been accomplished.

In preparing the plan, the life care planner must address what effect the injuries have had not only on the traumatically injured individual but also on the individual's family. The emotional turmoil suffered by caregivers cannot be discounted or ignored. Families who have sustained a relative's traumatic injury often experienceisolation, depression, anxiety, and fatigue. It is necessary that the life care planner assess whether any family members might also need future medical care, such as family or individual counseling.

Finally, because the life care plan will document the need for future care over the person's entire life, it must be

presented in today's dollars. Because most life care planners lack the expertise to perform the economic analysis that reduces costs of a life care plan to present value, it will be necessary to retain an economic expert to make this calculation.

Dealing with the Defense Attack

The object of the life care plan is to fully and fairly compensate the injured individual and to enhance the quality of life to the greatest extent. Although the injured individual is the innocent victim of another's negligence, the role of defense counsel is to minimize, or contain, the cost or recovery. One can expect the defense attorney and the insurance carrier to mount an all-out attack against the plaintiff's life care planner. These attacks will first center on the life care planner's credentials and qualifications and the methodology used in preparing the life care plan and ultimately will attack the plan itself.

***Daubert* and the Admissibility of Expert Life Care Planner Testimony**

Since the United States Supreme Court's landmark decision in *Daubert v. Merrill Dow* (1993), federal and state court trial judges have scrutinized the opinions and methodologies utilized by all experts called to testify on behalf of the parties. Before a life care planner may testify, the adversary attorney and trial court will scrutinize the plan's methodology. The attack against the life care planner will focus on the planner's opinions included in the life care plan that came not from a physician. Second, the life care planner's testimony will be attacked and a motion to strike filed based on the argument that the proposed testimony and opinions are outside the scope of the life care planner's expertise because a life care planner is not a medical doctor.

This latter argument recalls the antiquated belief that only physicians are qualified to give medical opinions about future medical care needs. Courts did not historically permit non-physicians to give medical opinions including diagnosis, causation, and prognosis. That prohibition has been lifted in most states in recent years when the non-physician expert has the requisite knowledge, skill, experience, training, and/or education in the particular field.

In presenting the life care planner as an expert, it is important not only to provide the court with an outline or summary of the expert's education, training, and experience but also to educate the court about the functions of the life care planner and clarify for whom the life care planner provides reports. Both the insurance industry and the federal government utilize life care plans. Insurance companies set reserves regarding the costs of future medical care, as does the government in funding Social Security or Medicare payments. To make such assessments, the insurance industry and federal government often retain a life care planner to make these calculations, frequently without the assistance or intervention of any medical personnel.

The argument that no qualified physician has offered foundational testimony about the need for and type of future medical care is a central attack designed to undermine the entire life care planning field as a profession. The acceptance of this defense argument reduces the life care planner to nothing more than a clerical staff member whose only responsibility is to quantify the costs of future medical care prescribed or recommended by a physician. The assault will further contend that, to prepare a life care plan, the life care planner must consult with a treatment team that will recommend a list of medical treatments for the individual's future health care. In negating this argument, the plaintiff's attorney must retain a life care planner with experience in preparing life care plans and, more importantly, one with experience in treating patients or assisting persons who have sustained traumatic injuries or who have chronic health conditions. It also is important for the attorney to understand life care planning and to establish that a particular life care planner's methodology is both appropriate and acceptable (Fick & Preston, 2015). Trial courts have upheld life care planners' qualifications when education, training, and experience in preparing life care plans is established, as in Coleman v. United States of America and Touchette (2003). Conversely, in Fairchild v. United States (1991), a Louisiana federal court rejected the qualifications of a life care planner who had taken only two seminars in life care planning and had compiled only 25 life care plans.

Will the life care planner be permitted to present expert opinion detailing what medical care will be needed or will the testimony be limited solely to providing testimony regarding the costs of that care? In *Kent Village Associates Joint Venture v. Smith* (1995), that issue was presented to the Court of Special Appeals of Maryland. The case involved a tragic accident in which the plaintiff was rendered a paraplegic. The plaintiff produced the expert testimony of Dr. Estelle Davis, who held a doctorate in rehabilitation counseling and was certified as a national rehabilitation counselor and by Maryland. Her expertise as a rehabilitation counselor was not contested by defense counsel. Instead, the principle attack on Dr. Davis' testimony was there was "no medical evidence from qualified medical experts sufficient to support" her opinion. The court rejected this defense, finding:

> We are satisfied, having reviewed her testimony and the exhibit prepared by her, that her opinions were adequately supported by medical evidence, where that kind of support was required, or by other facts that it was reasonable for Dr. Davis to consider. (Kent Village Associates Joint Venture v. Smith, 1995)

Conversely, in *Norwest Bank v. Kmart Corp*. (1997), the court granted defendant Kmart's motion to exclude the testimony of the plaintiff's life care planner, after reviewing the life care planner's qualifications. The District Court found that, although the life care planner had the necessary

qualifications and experience to be qualified as an expert, the witness testimony must still "fit the witness's expertise." The court was of the antiquated opinion that the projected need for future medical care called for a medical opinion, which the life care planner was not qualified to provide.

Sea River Maritime, Inc. v. Pike (2006) excellently illustrates the adjustment to obtain the admissibility of one's life care planner. Here, the plaintiff retained the same life care expert whose methodology was questioned in Norwest Bank v. Kmart Corp. (1997). Here, defendants appealed a plaintiff's verdict complaining that the trial court erred by failing to exclude the entire testimony of the plaintiff's life care planner. Defendants asserted that the life care planner was not qualified, and his testimony was irrelevant and unreliable. Defendants argued that plaintiff's expert should not have been permitted to testify as to the need for future care as he was not a medical doctor. In making its argument, defendants relied upon the unpublished decision in *Norwest v. Kmart Corp. (*1997).

On appeal, the Texas Appellate Court rejected the defendants' arguments. First, the court found that the expert was qualified to testify based on his "work in the field of life care planning for over 20 years and his 30 years of experience in health care management for people with disabilities." In deciding, the court also relied upon the expert having operated his own facility for rehabilitation, particularly for patients with neurologic impairments, his master's degree in rehabilitation counseling and his doctorate degree in counseling.

Regarding defendants' "Norwest" argument, the appellate court distinguished that case from the facts and testimony presented here. The court stated:

> Norwest is plainly distinguishable. As we read [the expert's] testimony, his approach in this case avoided the mistakes in Norwest. He based much of his cost evaluation upon the records and recommendation of the treating physicians. Unlike Norwest, other qualified health care providers testified and related many of the components of the health care plan. Further, unlike Norwest, *Sea River* also provided health care evidence through its own life care expert. (*Sea River Maritime, Inc. v. Pike*, 2006).

Finally, defendants argued that the opinions were unreliable, selectively choosing three items of cross-examination where the expert admitted there was no doctor recommendation for the stated therapy. The court noted that, while no specific objections had been lodged to that testimony, the court went further finding that the expert life care planner had considerable expertise to assess actual medical costs, further consulted and confirmed with the treating doctors their opinions on both the need for and cost of ongoing treatment. The court found that under the circumstances, it could not say that the trial court abused its discretion in admitting the testimony.

More recent cases have also rejected that a life care planner, to be admitted as an expert, must be a physician or that the life care planner's opinions must be based upon the testimony of a medical physician regarding the need for future medical care.

Following a jury trial, defendant appealed a verdict for injuries sustained by the plaintiff in a bulldozer incident. *Dan Cristiani Excavating Co. v. Money* (2011). Defendant argued the trial court erred in permitting Laura Lampton, a registered nurse and certified nurse life care planner, to testify regarding a life care plan she prepared for Money. To prepare Money's life care plan, Lampton reviewed Money's medical records and rehabilitation records, the depositions of plaintiff's doctors, and spoke with Money and Dr. Kenneth Mook, plaintiff's rehabilitation specialist. Defendant argued Lampton's testimony served as an improper conduit for statements by Dr. Mook regarding Money's future treatment, which was improper because Lampton was not qualified to make such statements, they were hearsay statements, and Dr. Mook was not provided for cross examination.

The trial court permitted Lampton to testify as an expert. The trial court was satisfied that Lampton's reliance on physicians' recommendations in preparing a life care plan for the plaintiff was sufficiently reliable. No one argued Lampton was qualified as a physician or otherwise to determine or hypothesize what plaintiff's future medical needs would be. Lampton clarified for the jury she was not "trying to testify about what [she] think[s] [Money]'s medical needs will be in the future," and that physicians alone decide what his future needs or treatments will be.

The Indiana appellate court upheld the trial court's ruling, finding:

> The trial court ruling and Lampton's testimony make clear that Lampton's expertise was in compiling the reports and opinions of physicians to convey estimates and future projections based on facts and opinions she received from Money's doctors and her research and experience with medical costs. Lampton's expertise was in estimating the costs of the treatments and procedures that the doctors told her about, described in their reports, or disclosed in their depositions. She did not attempt to craft a medical opinion, and the trial record is clear in this regard.

In *Oram v. Decholnoky* (2008), the testimony of a life care planner was admitted, although the planner was not a medical doctor, because the planner had years of experience, was certified, was a fellow of the International Academy of Life Care Planners, and was also certified as a disability analyst and vocational evaluator. The court rejected the defendants' argument that the expert's testimony was inadmissible because he was not a medical doctor.

Similarly, in *Marcano v. Turabo Medical Center*

Partnership (2005), the 1st Circuit Court of Appeals upheld the U.S. District Court's denial of a motion to strike a life care planner as an expert. The life care planner had sufficient education and professional credentials, had been admitted as an expert on rehabilitation and life care planning in numerous state and federal courts, and his proposed plan was based on a review of records from an agency providing the child with skilled medical care, a letter from the child's physician, and an interview of the child's family and caregiver. The court stated: "although [the expert's] report might have benefitted from a physician's review of the projections regarding [the child's] future needs, the court did not abuse its discretion in determining that [the planner's] methodology was sufficiently reliable for admissibility" (415 F.3d. 162, 171)

Defense Attacks on Life Care Plans

Remembering that the defense attorney's role is cost containment and damage control, it is logical that the defense will next attack the assumptions made and the opinions rendered by the plaintiff's life care planner. From the perspective of a plaintiff's life care planner, the life care plan is based on assessing real costs, highlighting necessary care and projecting a plan that creates the least restrictive environment for the person with the disability. Defendants will attempt to place the individual in the least costly environment, often arguing that the one's spouse should provide needed care or recommend placement in a restricted environment, based solely on cost. However, it is not only unfair but also wrong to reject needed care and, instead, place that burden of care on the injured person's spouse or parents because the defendant caused the injury that resulted in the need for care and should be held responsible for the entire harm caused.

Defendants will sometimes hire their own life care planner to counter the plan that the plaintiff's life care planner submits. Most defendants will not do so, however, because they fear setting a monetary floor at which the jury will begin when determining an appropriate figure for future care. The purpose of presenting the defense life care planner is cost containment and damage control. Some defense life care planners will eliminate as much of the proposed care as possible, shifting the burden of care from trained professionals to a person's caregivers.

The case of *Cogg v. Dawson* (2007) provides an interesting attack by the plaintiff's counsel on such a defense expert hired not to project her own life care plan but to attack the methodology utilized by the plaintiff's expert. There, plaintiff sought to exclude the expert testimony of the defendant's life care planner regarding the details of the life care plan created by the plaintiff's retained expert. The plaintiff did not challenge the defense expert's qualifications to testify competently, and the court found no reason to doubt her expertise, finding that her experience as a counselor with an advanced degree in rehabilitation counseling, a quarter-century's worth of experience, and that she had prepared over 20 life care plans satisfied the court she was qualified to testify.

Having determined the defendant's expert was qualified to testify, the court then needed to determine the reliability of the testimony. The plaintiff argued before trial that the plaintiff's expert could not challenge the "specifics of one plan without possessing the knowledge to create her own."

The defendant conceded that no "reliability argument" could be made regarding her own life care plan and, at most, "it would appear that [the defendant's expert] can testify as to how to make a life care plan and what steps are involved in its creation." However, the court held that the defendant's expert could not testify specifically regarding the need of the injured plaintiff as the defendant's expert had not tried to educate herself regarding the specific needs of the plaintiff. The court held that all the defendant's expert could do was criticize the plaintiffs' expert's methodology but not his findings, and the defendant's expert could not dispute the facts that the plaintiff's expert used in creating his plan.

Because life care plans project medical care costs over the individual's lifespan, in most, if not all states, the plan must be presented in today's dollars. This is called discounting. Because the individual and family will receive the cost of the life care plan today for medical care needed, the plaintiff can invest those monies and earn interest. It is necessary to consider the effect of inflation regarding the value of money. Where interest earned outpaces inflation, the life care plan must be reduced to reflect its present value. If the effect of inflation on the cost of medical care is greater than the interest that can be earned on that investment, the present value of the life care plan must be increased. This is called a net negative discount effect. Where the interest rate and the inflationary rate are equal, this is called a total offset.

Defendants will often retain an economist who will use an inappropriate discount rate, which will have the effect of severely reducing the present value of the life care plan, providing inadequate funds to care for the individual over his or her lifetime. To appreciate the significance of the discount rate used, consider this example:

Johnnie Smith is a three-year-old male child who sustained a traumatic brain injury in a car crash. The child will likely require future medical care and some assistance in living independently. He is expected to have a normal life expectancy. The economist calculated the present value of the cost of the life care plan to be $3,646,562.00, using the total offset methodology to arrive at the present value of the loss. Another economist, employing a one percent net positive discount rate, opined that the cost was $2,403,015.00, a reduction of over one million dollars! A third economist utilized a two-percent net positive discount rate, resulting in a present value cost of $1,619,559.00, a reduction of over two million dollars! An economist who used a net negative discount rate, i.e., the rate of medical inflation outpaced the interest rate, would have to increase the value over the $3.646 million figure used by the

economist who used a total offset (Stern, 2006).

Finally, in a continuing effort at cost containment, defendants may retain or make use of an annuitist who can minimize or reduce the cost of the life care plan by proffering that an insurance annuity purchased at a far cheaper cost can fund the specific life care plan and provide an income stream for the individual's future medical needs. From a legal standpoint, this is flawed because no state requires an injured person to purchase an annuity with the proceeds of a personal injury award. The cost of the annuity is based on the risk assumed by the issuing insurance carrier, and the purchase of such an annuity establishes a fixed rate of return. The question then arises on why the defendant who caused the harm should make these determinations. The survivor or guardian should decide how the settlement funds or jury's verdict should be invested for the one's future medical needs.

The cost of an insurance annuity is not based solely on projecting the present value of the projected future cost of the medical needs. Rather, in pricing an insurance annuity, the insurance carrier considers its own determination of the individual's life expectancy, future inflation, rate of return, overhead costs and expenses, investment risk, market strategy, and profit level (Langerman, 2001). Such testimony is inadmissible, despite continued attempts by defendants to introduce it. In *Diede v. Burlington Northern Railroad Co*. (1985), defendant retained an insurance salesman to testify about the cost of an annuity to replace Diede's economic losses. The railroad also offered to present testimony that the payments would be tax-free if the railroad purchased the annuity and offered "to stipulate and bind Burlington Northern that if any final judgment or settlement is taken against Burlington Northern in this case, that the Burlington Northern will, at the option of the plaintiff, satisfy that settlement or judgment by the purchase of a similar annuity at whatever rate is available at the time the annuity is purchased." The trial court and appellate court on review rejected the introduction of this testimony.

Presenting the Life Care Planner in Court

Economic damages are often the benchmark or jumping-off point for jurors when they deliberate to award non-economic damages. Remember that none of the funds sought for the life care plan will ultimately go to the plaintiff, but, will pay for future medical, support, or replacement care. As Ball (2005) cautions, economic testimony is important because the jurors should know the purpose each item serves, to which specific injury the item relates, and what will happen if the item is not provided. He states further:

> Some attorneys tend to rush testimony about the life-care plan because it seems tedious. It is quick and easy to describe a few representative examples of the items of the life-care paln, and then give a grand total….The defense does not want the life care plan to be presented carefully and concretely. The defense prefers you to leave the jury with only a vague idea of the life care plan's content. (Ball, 2005, 176-177).

Rarely will the defense be able to attack every item. Rather, defense counsel will pick a few specific items to discredit the entire report and will attack the plan either through cross-examining the plaintiff's life care planner or through the direct testimony of its own life care planner. If the life care planner has omitted those items, the plan is more difficult to attack. But the defense will always argue that certain items are unnecessary. If the life care planner has presented every item, it is then easy for plaintiff's counsel, in summation, to tell the jury to eliminate those items in dispute, which will leave much of the life care plan intact and still present a formidable damage amount.

Conclusion

In every case in which plaintiff's counsel represents an individual with significant injury, a life care plan is essential. Even some cases involving a mild brain injury can prevent the individual from performing certain activities for which replacement support care will be needed. Remember, only a small part of the life care plan involves future medical care to treat physical residuals. A person with a traumatic injury, be it mild or severe, will have suffered intangible losses for which a life care plan can establish economic value. Omitting a life care plan will undermine the plaintiff's case and prevent the plaintiff from obtaining true compensation for all that has been lost. Compensation, the principle upon which our civil justice system is based, is the provision of balance. Justice balances harm with proper compensation. Cost containment and damage control may be the principles the defense must ensure, but they are not the principles upon which a life care plan should be based.

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